

NAPOLEON
IN EXILE: ST. HELENA

BY THE SAME AUTHOR

NAPOLÉON IN EXILE ELBA (1814-1815)

By NORWOOD YOUNG

Author of *The Growth of Napoleon, etc.*

WITH A CHAPTER ON THE ICONOGRAPHY

By A. M. BROADLEY

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NAPOLEON IN EXILE: ST. HELENA

: : : (1815-1821) : : :

BY NORWOOD YOUNG

AUTHOR OF "NAPOLEON IN EXILE ELBA", "THE GROWTH OF NAPOLEON", ETC

WITH TWO COLOURED FRONTISPIECES

& ONE HUNDRED ILLUSTRATIONS MAINLY

FROM THE COLLECTION OF A. M. BROADLEY

. AUTHOR OF "NAPOLEON IN CARICATURE," ETC. .

VOLUME I

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Yes, where is he, the champion and the child
Of all that's great or little, wise or wild,
Whose game was empires and whose stakes were thrones,
Whose table earth, whose dice were human bones?
Behold the grand result, in yon lone isle,
And, as thy nature urges, weep or smile

BYRON

PREFACE

SIR HUDSON LOWE left behind him a very large collection of papers relating to his public career. Twenty-two volumes have found their way into the Bibliothèque Nationale, Paris. One hundred and thirty-five rest in the British Museum. Of these, ninety deal with the St. Helena Governorship. They contain Lowe's correspondence with Lord Bathurst; with the Naval Commanders and other high officials in England, St. Helena, the Cape of Good Hope, and elsewhere; with the Foreign Commissioners at St. Helena; and with Napoleon and his followers; the official orders and proclamations; the reports of officers, military and civil; a large number of letters exchanged between the various officials; and the accounts, lists, pay-sheets, and other official documents. The collection contains documents unfavourable to Sir Hudson Lowe, and many which are of no permanent interest.

This immense mass of first-hand evidence was made the basis for Forsyth's defence of Lowe, published in 1853. In addition there are at the Record Office twenty-nine volumes of reports and other official documents bearing upon Napoleon's detention at St. Helena.

When Forsyth wrote, very little contemporary evidence had been published. The works of O'Meara, Las Cases, Antommarchi, and Montholon, though based upon diaries, were issued after the death of Napoleon, and bear clear evidence of having been prepared with a definite object. We have to turn to them for information as to what went on in the interior of Longwood, but on all controversial subjects they are tainted with deliberate misrepresentation and

falsehood. Apart from that disfigurement, such worked up material cannot compare in authority with the contemporary records. Even honest reminiscences, such as those of Mrs Abell, surgeon Henry, chaplain Vernon, the Countess of Montholon, and others, which were written after a lapse of time, have to be read with discrimination.

Forsyth had to rely upon the Lowe manuscripts for most of his facts. Since his day, a quantity of valuable original matter has become available. Extracts from the reports of the Foreign Commissioners to their Courts have been published, and we have had the diary of Lady Malcolm, the private journal of General Gourgaud, and the letters exchanged between Count and Countess Montholon and a number of letters from British officers have appeared in various magazines. All this is strictly contemporary evidence, taking rank with the documents in the British Museum and Record Office. It is upon these original sources that the story must be based.

A personal acquaintance with the island of St. Helena, and in particular with the house in which Napoleon lived and the grounds in its neighbourhood, is very important for a proper understanding of the Napoleonic detention. Accompanied by Mr Graham Balfour, the author of the 'Life of R. L. Stevenson' I have spent five weeks in the house that was built for General Bertrand and his family, at Longwood, in 1810. It stands within 118 yards of Napoleon's house, according to our measurement of the distance with a tape. Napoleon's house is now only half its former size: the gardens have disappeared: the wood has been cleared away: there is no camp of red-coated soldiers in the distance. But, in other respects, the scene has not changed, and the five weeks at Longwood have proved of immense value to me, clearing away difficulties and giving a familiarity with the conditions, upon which alone a confident judgment can be founded.

I have to thank Monsieur Roger, the French Consul who

is in charge of Longwood House and the Tomb, for the plan of New Longwood; the Hon. W. J. Arnold, Colonial Surgeon at St. Helena, for information about the climate, and our host Mr. James Deason, who with his brother, Mr. Fred Deason, farms the Longwood estate, for ready advice and assistance at all times.

The Earl of Bathurst has lent me, for reproduction, the contemporary water-colour of Longwood House, by Basil Jackson, which is in his possession.

The late Earl of Crawford gave me permission to examine, at my leisure, his large collection of Napoleonic manuscripts. The present Earl of Crawford has kindly allowed me to reproduce the pencilled note, made by Dr. Arnott, announcing the death of Napoleon.

The bulk of the illustrations have been furnished by Mr. A. M. Broadley from his well-known collection, which is especially rich in prints and caricatures. Mr. Broadley has also placed at my disposal his manuscripts and his remarkable library of works dealing with the St. Helena captivity.

Dr. J. F. Silk has been most kind in permitting me to make use of some of the prints in his large collection.

I have to thank Mr. Graham Balfour for the excellent photographs, which were taken by him on the occasion of our visit, in February, 1914. Mr. Balfour has also drawn for this book the plan of Bertrand's house, the first yet published. His criticisms and suggestions, made on the spot, have been of the greatest service to me.

Dr. Arnold Chaplin has given me the benefit of his professional advice, and he has read the proofs; but he is not to be regarded as responsible for, or as endorsing, anything in this book. Dr. Chaplin's study of the manuscripts in the British Museum and Record Office, and his researches into the careers of the various personages who stood on the St. Helena stage, have made him an exceptional authority, and I am most grateful to him for the generous manner in which he has placed his knowledge at my disposal. By

ingenious and painstaking enquiries Dr Arnold Chaplin has discovered a number of portraits of St Helena celebrities. He has kindly given me leave to reproduce some of them from his indispensable vade-mecum, "A St Helena Who's Who," 1914. The portraits of Dr Wilks and Dr Baxter were provided by Dr J F Silk, the great nephew of Dr Baxter, that of Sir Thomas Reade came from Mr Alleyn Reade, of Major Gorrequer from Mr G de Gorrequer Griffith of Captain Ross from his godson Admiral F R Boardman, C.B., of William Balcombe from his grand daughter Mrs Emmerton, of Admiral Plampin from his nephew Mr Orbell W Oakes of Dr Shortt from his grand son Major A. G Shortt of Dr Burton from his grand daughter Mrs. Agg of Dr Arnott from his niece Mrs Arnott Collington. Dr Chaplin has also furnished me with the coloured frontispiece to the second volume, from a picture in his possession.

Mr G L de St. M. Watson, the first writer since Forsyth to undertake a serious examination of the Lowe manuscripts—a laborious task—has helped me in various ways. I have also to thank Major Smyth, M.V.O. for assistance with regard to the 20th Regiment, now the Lancashire Fusiliers.

References to the Lowe manuscripts are given under the heading B.M. (British Museum).

The precursor of this work, *Napoleon in Exile Elba*, was published on the 31st March, 1914 one hundred years after the event with which it commenced the entry of the Allies into Paris on the 31st March 1814. These volumes in like manner are published on the 1st March, 1915 the centenary of the opening point, the landing of Napoleon near Cannes, on the 1st March, 1815.

NORWOOD YOUNG

1st March 1915

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NAPOLEON

IN EXILE: ST. HELENA

CHAPTER I

THE OUTLAW

ON the 1st March, 1815, just a hundred years ago, Napoleon returned from his exile at Elba, and placed his foot once more on the soil of France. He had brought with him from his island kingdom 600 men of the Old Guard, 100 Polish Lancers, and 300 Corsicans; 1000 soldiers in all, besides his suite of civilians. They were encamped on the beach near Cannes. With this force Napoleon was making war upon the Government of Louis XVIII.

At midnight the march to Paris commenced. The route was across the mountains to Grenoble. By 8 p.m. of the 2nd March, in twenty hours, thirty-one miles of hilly country had been covered. A little further, at Castellane, Cambronne, who marched at the head of a small advance guard, demanded from the sub-prefect, in the name of "the Emperor," five thousand rations of bread, meat, and wine, with mules and carts. These supplies were, after some hesitation, given. The adventurers marched on, reached Digue in the afternoon of the 4th, and Cambronne obtained command of the important bridge over the river Durance at Sisteron, at 1 a.m. of the 5th. The force sent from

Marseilles by Masséna to seize the bridge, arrived two days late

Napoleon arrived at Sisteron before noon on the 5th. He was well received. He rested the night at Gap. The inhabitants welcomed him there with enthusiasm. The people of Dauphiné were with him. It was in Dauphiné that the Revolution had commenced, and it was as a support against Royalty and Privilege, as a Jacobin, that Napoleon was now being welcomed.

On the 6th he rested at Corps, one march from Grenoble. On the 7th he went forward in a carriage, in the midst of his Guard, followed by the Corsicans, towards Grenoble. A crowd of fifteen hundred persons accompanied him, crying "*Vive l'Empereur!*" Grenoble was the head quarters of a military division commanded by General Marchand, who had already been warned of the approach of Napoleon. He sent out the 5th Regiment of the line to stop the adventurer. Napoleon walked straight up to the soldiers at the head of his Old Guard. A captain cried out, 'There he is! Fire!' but no shot followed. Napoleon stepped forward. 'Soldiers of the 5th of the line,' he said in a steady, firm voice, "I am your Emperor. You recognize me. Then advancing a pace or two farther, he opened his overcoat, and said, 'If there is among you a soldier who wants to kill his Emperor here I am. This appeal, with the busbies of the famous Guard in the background, was overpowering. Cries of "*Vive l'Empereur!*" rent the air and the soldiers crowded round their old leader. This was the only critical moment in the march upon Paris. The plebs had been with Napoleon from the first, and now he was assured of the army. La Bédoyère brought out from the town the 7th Regiment, to welcome Napoleon who entered Grenoble in the evening without opposition. He said afterwards, at St. Helena, 'Before reaching Grenoble I was an adventurer, arrived there I was a Prince.

His progress thenceforth was triumphant, escorted at



NAPOLEON'S RECEPTION BY THE 7TH REGIMENT AT GRENOBLE

From a print by Jazet, after Steuben

every step by crowds of peasants, and joined by every regiment that was met. At Lyon, reached on the 10th, he was received with acclamation. There he was once more the Emperor.

At Lyon the Emperor issued a number of decrees. He abolished the old nobility and all feudal titles, disbanded the Swiss regiments and the *Maison du Roi*—the military guard of Louis XVIII—and banished all the *émigrés* who had returned to France under the Bourbon rule; he abolished the Chamber of Peers, dissolved the Chamber of Deputies, and convoked the electoral colleges of the Empire at an Extraordinary Assembly to be called the *Champ de mai*. These measures, which seemed to presage a return to the Revolution, responded to the cries that had met him everywhere on the route; mingled with “*Vive l’Empereur !*” were “*A bas les prêtres ! A bas les nobles ! Mort aux Royalistes ! A l’échafaud les Bourbons !*”¹ Napoleon was returning to France as a Jacobin general, as Robespierre on horseback.

He went on from Lyon, on the 13th, at the head of fourteen thousand men. Ney was sent by Louis XVIII to oppose him. Ney promised that he would bring back Napoleon in an iron cage, but his troops would not obey him, and, as he complained, he “could not stop the ocean with his hands.” He was powerless to resist, and went over to the conqueror.

Louis XVIII left the Tuileries in the night of the 19th–20th March. Napoleon entered the rooms he had vacated, in the evening of the 20th. When his carriage drove up he was received with roars of cheers; he was carried on the shoulders of his enthusiastic friends up the grand staircase.

It was a triumph without parallel in history. The danger of the enterprise was not as great as might be imagined. It was notorious that both the peasants and the soldiers were prepared to revolt against the reactionary Government of Louis XVIII. Napoleon knew that his return would be wel-

¹ Houssaye, “1815 Le retour de l’île d’Elbe,” p. 268

comed by a large part of the nation. For all that, the achievement was of a dazzling nature. It raised the prestige of Napoleon to the high clouds, in which only the gods can live. It forced upon Europe a relentless war against the power of a threatening giant. It made a remote island, outside the world of affairs, the only possible final resting place for a man whose mere appearance had been enough to create a European convulsion.

On the 20th March, 1815, the day of his triumphant return, the counterblast of the Powers reached him. On the 18th March the eight chief Powers issued at Vienna a manifesto, which said "The Powers declare that by breaking the convention which had established him at the island of Elba, Napoleon Bonaparte has destroyed the sole legal title to which his existence was attached, that by reappearing in France he has placed himself outside the pale of civil and social relations, and that, as the enemy and disturber of the peace of the world he has delivered himself to public justice. Napoleon was declared by all Europe, outside France, an outlaw.

Even in France he found his position uncomfortable. He had raised expectations of a democratic government which he had no intention of establishing. To make a show of meeting public wishes, he issued the *Acte additionel*, a slight amendment, in a popular direction of the Constitution of the Empire. It met with universal disapproval, going too far for some, and not far enough for others. Napoleon found a very different spirit in France from that to which he had been accustomed, while he himself was constitutionally incapable of being anything but what he had always been—a despot. He said, with contempt, that the Bourbons had learned nothing and forgotten nothing. To no man did the criticism apply with more justice than to himself. He laughed at Louis XVIII for issuing ordinances as in the twenty second year of his reign, but the *Acte additionel* was an assumption that the Empire also had not been interrupted.

He expressed one day to Count Molé his fear that the Republican party would prevail, spoke of scenes he had witnessed in the Revolution, with disgust and emotion, and acknowledged that had he foreseen how much compliance with the democratic party was necessary, he would never have left the island of Elba.¹ Lucien and Fouché urged him to abdicate, but he was not the man to do so, before Waterloo.

All Europe was arming against him. On the 25th March, England, Austria, Prussia, and Russia entered into a treaty of alliance, each party undertaking to keep in the field a force never less than 150,000 men, "until it shall have been made absolutely impossible for Bonaparte to excite troubles, to renew his attempts to seize the supreme power in France and menace the safety of Europe." This treaty was the necessary sequel to the European denunciation of Napoleon as an outlaw, on the 13th March. It meant that Europe would not tolerate any longer the interference of Napoleon in public affairs. The exasperation against him of the monarchs and their nations was such that there was no hope for him. Europe had risen, when prostrate under his foot, and had swept him away in 1812-14. The issue of the coming conflict could not be doubtful. Napoleon and France were not now, and never had been, strong enough to stand against united Europe.

The Emperor of the French sent letter after letter to his wife at Vienna, saying that he expected her in Paris, but no answer came. His kinship with kings was repudiated. As the lonely man strode up and down the deserted apartments of his Palace, feeling insecure and uncomfortable at home, and watching the approach of certain defeat from abroad, he passed through a terrible experience of moody despair. It was observed that he had not the former incisive energy. He admitted afterwards that he had lost much of his confidence. The failures of the past, the hopeless outlook for the future, had gone far to crush his spirit.

¹ Lord Holland's "Foreign Reminiscences," p. 303

The danger from without afforded a respite from the trouble at home. France gave him every support in his effort to beat back the invaders, but the task was too great. Fouché said that Napoleon would win a battle, perhaps two battles, and then be completely overthrown. He won the battle of Ligny, and was overwhelmed at Waterloo.

Returning at once to Paris he found that his services were no longer required. He was not wanted either as soldier or civilian. He could not protect France from invasion, he was incapable of giving the French citizens a reasonable amount of liberty. He was dismissed. He was forced, by threats of deposition, to abdicate, on the 22nd June, 1815, leaving the succession to the Empire to his infant son. Napoleon II was proclaimed Emperor but in a few days the Allies approached Paris, bringing back Louis XVIII.

France had given Napoleon a chance of recovery during the Hundred Days. He had failed in every direction. His career was ended, finally and irretrievably. Napoleon after Waterloo was a spent force. A return from St. Helena, in the Elba manner would have come to a speedy conclusion in disaster. He was no longer a man to be feared. It was said that if his cocked hat had been washed up on the shore, all Europe would have flown to arms. The Napoleonic symbol still appealed to the imagination, the cocked hat might still be revered—but not the head which it had contained. The reputation of Napoleon, the glamour of his marvellous career was now greater than ever. The power of the man was broken, even in France, beyond repair.

CHAPTER II

FLIGHT

WHEN, before the advancing Prussians, the Provisional Government in Paris asked for an armistice, Blücher replied that he would consider it if Napoleon were delivered over to him, dead or alive. Wellington remonstrated. He wrote to Sir Charles Stuart, on the 28th June, 1815: "The Parisians think the Jacobins will give him over to me, believing that I will save his life. Blücher writes to kill him: but I have told him that I shall remonstrate, and shall insist on his being disposed of by common accord. I have likewise said that, as a private friend, I advised him to have nothing to do with so foul a transaction—that he and I had acted too distinguished parts in these transactions to become executioners—and that I was determined that if the Sovereigns wished to put him to death, they should appoint an executioner, who should not be me."¹

Gneisenau expressed the Prussian feeling when he declared that the Duke's pretence of humanity was a cloak for his desire to keep alive the man whose career had extended the power of England. The English soldier's intercession on behalf of his defeated enemy earned for him, and his nation, the charge of treachery to Europe.

Napoleon was under no illusion as to the dangers which surrounded him on the Continent of Europe. On the evening of the 21st June, the day of his return from Waterloo, when he had not yet abdicated, he was dining with Hortense at the

¹ Castlereagh's Letters, 3rd series, vol. II, p. 386

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ex-King of Corsica, and Horace Walpole. Theodore had taken refuge in England, but had been imprisoned for debt, and Walpole had raised a subscription for him. Napoleon makes Theodore exclaim: "Unjust men! I tried to contribute to the happiness of a nation. I succeeded for a time, and you admired me. Fortune has changed. I am in a dungeon, and you despise me." To this Walpole replies: "You suffer and are unhappy. These are two reasons for claiming the sympathy of an Englishman. Emerge then from your prison and accept a pension of £3000 a year."

In 1789, a year later, Napoleon was writing a story about an Englishman wrecked on the island of Gorgona, whom he described as "one of those virtuous Englishmen who still protect our fugitive citizens." The belief that he would be received well in England—though he was an enemy, while Paoli and Theodore had been allies—was thus derived from feelings which had been among the dominant passions of his youth.

As a fallen man in 1814, and again in 1815, he feared assassination, wherever he might be—except among the English. After the abdication at Fontainebleau in 1814 he endeavoured to obtain through Lord Castlereagh, "an asylum" in England, where he would have "security," that is to say, a refuge from assassination. He insisted on being taken from France to Elba on an English ship, the *Undaunted*, and remarked when he got on board that he then for the first time felt safe.¹ At Elba he continued to speak of taking refuge in England, discussing the point on various occasions with Campbell, the British Commissioner, with Koller, the Russian, and with his own followers.² When he was landing at Elba, he desired that boats with marines from the *Undaunted* should keep close to his barge; on shore he asked for a guard, in his own Kingdom, of fifty British

¹ In our own day the Czar Alexander II used to declare that he never felt quite secure from danger except on a British man-of-war

² See "Napoleon in Exile at Elba," pp 48, 49, 60, 79, 84, 107, 136, 141, 262, 287

Elysée His stepdaughter urged him to write to the Emperor Francis, or to the Czar "Never," he replied, with emphasis, "Never will I write to my father in law. I have too much to complain of in his having kept away from me my wife and my son. It is too cruel. Alexander is like other men, if I am brought to a pass of that kind I should prefer to address myself to a people, to England."¹ He appeared, subsequently to have abandoned the project, at the instance of Hortense, Bassano, Flahaut and others who spoke of its dangers, and he then talked of going to the United States, but the plan of throwing himself on British clemency had been far too long in his mind to be dropped because Hortense wept, and others had misgivings.

Napoleon had from early childhood been reared in an atmosphere of hatred of France and Genoa, and admiration of England. Genoa sold Corsica to France in 1764 and the new owner after a strenuous resistance on the part of the great Corsican patriot, Pasquale Paoli conquered the little island in 1768. Paoli retired to England where he obtained from the British Government a pension of £2000 a year. Napoleon was born in 1769 at a time when Corsican patriots were looking to England for protection against their French oppressors. England was like Corsica, an island detached from the nations of the Continent, and France was her hereditary enemy. Napoleon's short stature, and his activity seemed to fit him for a life at sea. He was destined for a naval career and his boyish thoughts turned often to the nation whose navy was the pattern for all imitators. His foster brother, Ignazio Ilari with whom he spent much of his time on the beach at Ajaccio with an occasional outing in a boat, joined the English Navy and fought against France. Admiration of England, and especially of the English Navy was bred in Napoleon from his earliest years, and remained with him throughout his great career. At the age of eighteen he wrote out an imaginary correspondence between Theodore,

¹ *Houssaye*, i 1815 "p. 46.

ex-King of Corsica, and Horace Walpole. Theodore had taken refuge in England, but had been imprisoned for debt, and Walpole had raised a subscription for him. Napoleon makes Theodore exclaim: "Unjust men! I tried to contribute to the happiness of a nation. I succeeded for a time, and you admired me. Fortune has changed. I am in a dungeon, and you despise me." To this Walpole replies: "You suffer and are unhappy. These are two reasons for claiming the sympathy of an Englishman. Emerge then from your prison and accept a pension of £3000 a year."

In 1789, a year later, Napoleon was writing a story about an Englishman wrecked on the island of Gorgona, whom he described as "one of those virtuous Englishmen who still protect our fugitive citizens." The belief that he would be received well in England—though he was an enemy, while Paoli and Theodore had been allies—was thus derived from feelings which had been among the dominant passions of his youth.

As a fallen man in 1814, and again in 1815, he feared assassination, wherever he might be—except among the English. After the abdication at Fontainebleau in 1814 he endeavoured to obtain through Lord Castlereagh, "an asylum" in England, where he would have "security," that is to say, a refuge from assassination. He insisted on being taken from France to Elba on an English ship, the *Undaunted*, and remarked when he got on board that he then for the first time felt safe.¹ At Elba he continued to speak of taking refuge in England, discussing the point on various occasions with Campbell, the British Commissioner, with Koller, the Russian, and with his own followers.² When he was landing at Elba, he desired that boats with marines from the *Undaunted* should keep close to his barge; on shore he asked for a guard, in his own Kingdom, of fifty British

¹ In our own day the Czar Alexander II used to declare that he never felt quite secure from danger except on a British man-of-war

² See "Napoleon in Exile at Elba," pp 48, 49, 60, 79, 84, 107, 136, 141, 262, 287

Z.

Zahrin v Gowri Sunkar, (1887) 1 L. R. 15 Cal	198	11
Zerkalee Koor v Lalla Doorga Pershad, (1871) 16 W. R.	140	107
Zoolfun Bibee v Radhika Prosunno Chunder (1878) 1 L. R. 3 Cal	560	315
1 C. L. R. 318		291
Zuheeroodeen Paikar v Campbell Mr J D (1865) 4 W. R.	57	

The Land-Law of Bengal.

ERRATA

- p 50, footnote 5, *for* 1893 *read* 1793
" 56, l 9, *for* VIII *read* IX
" " footnotes 3, 4, 5, 6, *for* VIII *read* XII
" 70, l 14, *for* 1705 *read* 1765
" 81, footnote 5, *for* VIII (B C) *read* VIII
" 82, footnotes 1 3, 4, *for* IX *read* VIII
" 96, l 5, *for* 1873 and XVI of 1871 *read* 1874 and XII of 1873
" 99, footnote 1, *for* VIII *read* IX
" 115, " 4, *for* VIII *read* VIII (B C)
" 119, l 33, *for* VII *read* VIII
" 128, footnote 5, *for* VIII (B C) *read* VIII
" 129, footnotes 1, 2, *for* VIII (B C) *read* VIII
" 210, footnote 4, *for* 1877 *read* 1879
" 422, lls 3, 7, *for* II *read* VI

judge-made laws and the expositions or codified and customary laws, that we find in the twenty-one volumes of the Indian Law Reports published since the learned lectures on Land Tenures were delivered

Z.

Zahrun v Gowri Sunkar, (1887) 1 L. R. 15 Cal.	198	11
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560 1 C L. R. 318		315
Zuheeroodeen Pakkar v Campbell M. I. D.	" "	

The Land-Law of Bengal.

LECTURE I

INTRODUCTION

THE Land Tenures of Lower Bengal formed the subject of the Tagore Law Lectures for the year 1874-75. The present course of lectures on the Land Law of Bengal will cover much the same ground, and I have the advantage of having the learned lectures on Land Tenures to help and guide me. But the subject is one of great importance, and high authorities have said that it is incapable of satisfactory treatment. Besides, oriental scholars, both in India and Europe, have, since the year 1875, succeeded in discovering by their indefatigable labours many of the juridical ideas about rights in land that prevailed in ancient India. The texts of our sages and the various commentaries thereon have, almost all of them, been now published and translated into English. The large mass of information collected by the Rent Commission resulted in the enactment of the Bengal Tenancy Act of 1885, which has materially altered the law of Landlord and Tenant in many of the districts in the Lower Provinces of Bengal. Add to all this, the judge-made laws and the expositions of codified and customary laws that we find in the twenty-one volumes of the Indian Law Reports published since the learned lectures on Land Tenures were delivered.

The Tagore
Law Lectures
on Land
Tenures
(1874-5)

Researches
and changes
since 1875.

Archaic notions in India about property in land.

Property arises from first occupation.

Mahomedan Jurists.

Following the usual practice I must begin these lectures by saying a few words about the ancient notion in India as to the origin of property in land – a notion which is not quite archaic, as it is still prevalent amongst the people wherever Mahomedan or British influence has not been much felt. A field "says Mann,¹ 'is his who clears it of jungle game is his who has first pierced it'. The later Roman jurists held the same opinion as regards the origin of property in land. Modern jurists have by the adoption of the historical method of investigation come to the conclusion that this notion about proprietary right in land is without foundation. But the illustration given in the Digest² is curiously the same as that given in Manu. 'Wild beasts birds fish and all animals which live either in the sea the air or on the earth so soon as they are taken by any one immediately become by the law of nations the property of the captor for natural reason gives to the first occupant that which had no previous owner'."

The great Prophet of Arabia said 'Whoever cultivates waste lands does thereby acquire property in them. The Mahomedan jurists differ in their interpretations of this text of the Koran. According to Abu Hanefsa the mere cultivation of waste land is not enough to create a real right in the cultivator the permission of the chief is necessary for the acquisition of proprietary right. But his disciples Abu Yusoof and Mahammed both of whom were judges under the celebrated Caliph Harun-al Rashid maintain that no permission of the chief is necessary to make the cultivator the proprietor. They say that waste lands are 'a sort of common goods and become the property of the cultivator in virtue of his being the first possessor, in the same manner as in the case of seizing

¹ मानुस्मृत्यसंक्षेपे — Manu Chap. IX v. 44

Digest Chap. CII. 11

Sanders Justinian p. 172 (2nd edition)

game or gathering fire wood"¹ It may be said that the Mahomedan Jurists who were familiar with the writings of the Roman Juris-consults, the Digest and the Pandects, borrowed this notion of proprietary right in land from the Eastern Empire and accepted the theory without much consideration The words of the Prophet, however, are significant, as we have no reason to believe that he himself had access to the theoretical doctrines that prevailed in later days in the Eastern Empire

Blackstone's theory is well-known and does not require repetition It is only an amplification of what the ancient lawyers accepted as the origin of the idea of proprietary right

Blackstone

Sir Henry Maine, in his well known work on Ancient Law, has discussed at length this theory of the origin of proprietary right, and he comes to the conclusion that though "this theory, in one form or another, is acquiesced in by the great majority of speculative jurists, the application of the principle of occupancy to land dates from the period when the *jus gentium* was becoming the code of nature, and that it is the result of a generalization effected by the Juris-consults of the golden age"²

Sir Henry
Maine

The great German jurist, Von Savigny, has dwelt at length upon the Roman theories about possession and *prehension* and the rights acquired thereunder, and it is stated that he was of opinion that property arose from "adverse possession ripened by prescription" But it does not appear that he agreed in the view of the Roman lawyers

Savigny

It is unnecessary to enter here into the debatable ground as to the origin of property in land, and, for myself, I would feel extremely diffident in expressing any opinion on a point on which great authorities

¹ Hamilton's Hedaya Book XLV 3

² Maine's Ancient Law, Chap VIII, pp 246—247

Consensus

have not agreed. It is enough for me to say that the juristical conceptions of the Indian sages, who lived and thought at a time when Rome was in its infancy were identical with the notions accepted in other countries in later times. This notion about the origin of proprietary right in land was firmly established in India. The great Indian poet Bharavi says —

भगवन्मां हस्तं यदा परिपश्य —
मयाति वस्तान् प्रसमेत तस्य ते ।'

"To whom do wild animals belong? They are his who first pierces them." It should be remembered that the Indian sages and lawgivers seldom made any distinction between movable and immovable property. Our Aryan fathers whether the theory of migration from Central Asia is believed or not had in Aryavarta a vast quantity of land uncultivated and not unlikely covered with virgin forest. They were fond of agriculture and called themselves tillers (*ri* to till), in contradistinction to the barbarians inhabiting the forests and hill tracts around, who lived upon the precarious fruits of hunting and the still more precarious natural products of the earth. Premium was necessarily given to agriculture and he who took possession of land cleared it and tilled it, was the person entitled to hold it on unmolested.

Earth *res*
common
according to
ancient
Indian autho-
rities.

But notions about proprietary right could hardly find place amongst people in the earlier stages of civilization. They are due to juridical refinement. The great Indian sages did not turn their attention to the theory they took a practical view of proprietary right. Earth according to them was common property just as air or water — a right to portions of it accrued from occupancy. The right was not to the soil but to the usufruct. They made no distinction in principle between *res nullius* and *res communes*. Jaimini's aphorism which according to

Jaimini

European authorities, was composed many centuries before Christ, is —“ Earth cannot be given away as it is common to all ”¹ Savara discussing the question of the right of the king to give away his kingdom in the sacrifice (Yajna) known as Viswajit, and commenting on the aphorism says—“ Earth is the common property of all human beings, though there may be occupiers of particular portions of it, none can be the owner of the whole earth ”² Sayana also commenting on this aphorism says —“ The soil is the common property of all and they through their own efforts enjoy the fruits thereof Therefore it follows that though pieces of land belonging to particular individuals may be given away, the earth cannot be given away (even by the king) ”³ To Roman Jurists “ things capable, by appropriation, of becoming the objects of private property, but originally belonging to none, would be *res nullius*, and what belonged to no one would become the property of the first one that takes possession of it ”⁴ The Indian idea would seem to indicate that land was communal property Sir Henry Maine and jurists of his school are also of opinion that in India land was considered to be communal property *Res communes*, according to Roman Law, included property belonging

Savara

Sayana's
commentary

¹ “न भूमि स्यात् सर्वान् प्रत्यविशिष्टत्वात्” ।
VI 7 2

² “क्षेत्राणामीक्षितारो मनुष्या दृश्यन्ते
नतु कृतमस्य पृथिवीगोलस्य” ।

Mimansa Bhashya VI 7 2

³ तस्या भूमौ स्वकर्मफल भुञ्जानानाम्
सर्वेषां प्राणिनां साधारणधनम् । अतीत-
साधारणस्य भूखण्डस्य सत्यपि दाने
महाभूमेर्दानं नास्ति ।

Nayamālā Vistara p 358

⁴ D XLI III, Gaius II 66, Hunter on Roman Law p 256

exclusively to the public in which no private right could be created, as the seashore or the right of fishing in the sea. On the other hand occupation might create right in communal property and by continual occupation even underground rights might be acquired by the occupier.¹

Non Aryan
races of
India.

Amongst the non Aryan races in India, who are thought to be the aboriginal inhabitants the idea still clings that kings are only entitled to rent—land whether cultivated or waste belongs to the people. The Mundas of Chotanagpur who claim as a nation to be the first occupiers of the soil are so strong in their opinion that they have contested in courts of law the right of the Rajas (the Nag family) to let out on lease the forests which afford timber. The Mundas think that they have exclusive right to the timber which grows in the primeval forests of the hill tracts and the king or remindar is only entitled to levy tax.

Ownership of
the subject to
land recognis-
ed by early
Hindu kings.

From the tenor of deeds of undoubted antiquity, of sales and alienations of estates to be found in the Mackenzie Collections and from the traces of individual proprietary right discovered in Canara Tanjore and other parts of the country in which the Mussulman Government was never or only partially established there is every reason to conclude that this right of the subject to the ownership of land was universally recognised by ancient Hindu kings.² Private property in land seems to have been recognised as a sacred right which even the hand of despotism would rarely violate.

The right according to Hindu law of the first person who makes beneficial use of the soil, was recognised by some of the Judges of the Calcutta High Court in

¹ Hunter on Roman Law p 310 Sinders Justinian Book II tit. I
Ricard's India Vol I p 282

the well-known case of *Thakuram Das v Bisweswar Mukherjee*¹ and by the Madras High Court in two cases from Malabar² Sir Charles Jurner, the then Chief Justice of Madras said—“According to what may be termed the Hindu common law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil The crown is entitled to assess the occupier with revenue, and if a person who has occupied land omits to use it and the claim of the crown to revenue is consequently affected, the sovereign is entitled to take measures for the protection of the revenue Whether the practice which has obtained in certain districts of requiring a person, who desires, to cultivate waste land to apply to the local revenue officer for permission to do so, has abrogated in those districts the Hindu law, or whether it may be justified by the establishment in those districts before British Rule of the analogous doctrine of the Mahomedan law, we consider it unnecessary to determine in this suit, for we have found that the land appertains to the district of Malabar, and we agree with the judge that there is no presumption in that district and in those tracts administered as a part of it that forest lands[✓] are the property of the crown ”

High Courts recognize the right of the first occupant

What, then, was the right which the king or chief had in the land in his kingdom? The Hindu Sages said, and said repeatedly, that the sovereign was not the proprietor of the soil He was entitled to a share of the usufruct of the lands in the occupation of his subjects, not because he was the owner, but because a share was payable to him as the price for the protection afforded to life, liberty and property. The records of Hindu thought from the earliest times point

Sovereign entitled only to a share of the produce

¹ B L R Sup Vol p 202

² Secretary v Vira I L R 9 Mad 175, Secretary v Ashtamurti I L R 13 Mad 93

Rig Veda in the conclusion. In the tenth Mandal of the Rig Veda occurs the passage—"May Indra ordain that your subjects pay only to you tax (Vali)"¹ Narada apparently commenting on this text defines *vali* in his Smṛiti—"Both the other customary receipts of a King and what is called the sixth of the produce of the soil form the royal revenue the reward (of a king) for the protection of his subjects"² European scholars have agreed in asserting that the Rig Veda is the earliest record we have of human thought, habits, manners and customs especially of the Eastern Aryans. They say that the sacred hymns were composed at a time when our Aryan fathers were just leaving a nomadic life and were taking to agriculture as the principal means of subsistence. I do not ask you to accept the theory that these hymns were composed about fourteen hundred years before the birth of Christ. To me as to many of you these hymns are of divine origin, but accepting as true the conclusions of the European scholars the text and the gloss of Narada show that even at this earliest stage of civilization when the king was really the *dominus* he had no right to the soil—he was paid only for the protection he afforded.

The later sages are unanimous in this theory of the king's right. I give you only the references without comment. The texts of Manu are well known.³ Yajña

¹ यदी त इन्द्र विसीर्विधी वसिष्ठकथनम्

VIII 8, 173.

² यज्जप्रकारादुचितान्ने वद्भावसहितान् ।

ब्रह्मि, स तथा विहित, प्रजापालनवर्तनम् ॥ Narada Smṛiti Ch. XVIII
v 48. Sacred Books of the East Vol. XXVIII p 221

³ Manu Ch. VII v 130; Chap X v 120; Chap. X v 118.

Other ancient texts

valkya repeats the same idea in verses 335 and 337 ¹ Apastamba² also enunciates the same doctrine of the king's right Vasishtha, speaking of the king's right, agrees in the opinion of the other sages ³ The Vishnu Smṛiti, which is said to be an ancient Dharmasutra, speaking of the king's duties, says —“ He must take from his subjects as tax a sixth part of every ear of the paddy ”⁴—“ A sixth part of flesh, honey, clarified butter, herbs, perfumes, flowers, roots, fruits, liquids and condiments, wood, leaves (of the palmyra tree and others), skins, earthen pots, stone vessels and anything made of split bamboo ”⁵

Baudhayana

I ought to have mentioned earlier the name of Baudhayana, as his language would show that his Dharmasutra was of a more ancient date He says —“ Let the king protect his subjects, receiving a sixth part ”⁶

Parasara

It is needless to quote any further texts on the subject It is enough to say that even Parasara, who is said to be the latest of the Sutra writers, agrees in saying —“ He (the king) receives taxes, and therefore

¹ अरक्ष्यमाना कुर्वन्ति यत् किञ्चित् किल्बिष प्रजाः ।

तस्मात्तु नृपतेरर्घं यस्माद्वृत्तात्सौ करान् ॥ 335

पुण्यात षड्भागमादत्ते न्यायेन परिपालयन् ।

सर्वदानाधिक यस्मात् प्रजाना परिपालन ॥ 337

Yajnavalkya Bombay Edition pp 98-99

² Apastamba Chap II, 10-26-9

³ Chap XIX 26-27

⁴ प्रजाभ्योबल्यर्थं सबत्सरेण धान्यतः षष्ठमशमादद्यात् ।

Vishnu Smṛiti V 22

⁵ मासमध्वृत्तीषधिगन्धपुष्पमूलफलरस-

दारुपवाजिनमृत्भाण्डाश्माभाण्डवैदलीभ्य षष्ठभागम्

Vishnu Smṛiti V 25

⁶ “षड्भागमती राजा रक्षेत् प्रजाः ।

Buhler p. 192

he should protect his subjects from thieves and others '1 I would only add that the authorities are not unanimous as to the king's share of the grain. The opinion of most of the text writers is that it is the sixth but you will find when you go through all of them that some times an eighth, tenth and even a twelfth is considered as proper. Gautama says — Cultivators must pay to the king a tax amounting to one tenth, one-eighth or one sixth of the produce '2

Jaimini
Mimansa.

Let us now see what later Indian authorities have said on this important subject. I would once more draw your attention to the Mimansa Aphorism of Jaimini which I have already quoted and Savara's and Sayana's commentaries thereon. Savara discussing the question of the king's right in the passage to which I have already referred you says — He (the king) cannot make a gift of his kingdom as it is not his as he is entitled only to a share of the produce by reason of his affording protection to his subjects '3 and Sayana adds, — 'A king's sovereignty lies only in his punishing the wicked and protecting the good '4 I need hardly say that Sayana known better and far more widely for his commentaries of the Vedas is said to have lived about the fourteenth century of the Christian era. The word Bhumapati or Bhupati means the protector of the earth. This was such a well recognised idea that you will find that in many Sanskrit books

¹ यथाप्युपद्रवं राजा यत्नयति समुद्रवः ।

संरक्षेत् सर्वतो यवान् यक्षान् गृध्राण्यसौ वरान् ॥

Vrihat Parashara

² Gautama Ch. V. v. 24

³ सार्वभौमस्यैव ऋषिदक्षिणं यत् यमी पृथिव्यां सत्पूतानां व्रीह्यादानां रक्षणेन निविष्टस्य अन्वयितुं शक्यम् ईदं न मूढे ।

⁴ दृष्टमिवाग्निदपरिपालनाभ्यां राज्य इमित्यत्र यत्प्रभित्तम् इति । न सार्वभौमिदं किन्तु तस्यां भूमीं यत्कचमत्तं मुद्राणां सार्वभौमं प्राणिनां साधारणं वर्गं ॥

the word 'king' is used as synonymous with the expression, "the appropriator of a sixth of the produce"¹ Even so late as the fifteenth century of the Christian era, when the Mahomedan Government was firmly established in Bengal and Mahomedan ideas about the relationship between the king and the subject, as contained in their books on law, were well known and well recognised, Srikrishna Tarkalankar in his commentary on the Dayabhaga of Jimuta Vahana says,—“By conquest and other means a king acquiring a kingdom has no other rights over his subjects than that of collecting taxes”² But you should remember that the Mahomedan conquest of India was never complete Either from necessity or idleness, the conquerors did not disturb the existing state of things they found in the country. They did not materially interfere with the fiscal system based on the old Brahminical ideas—a system which had prevailed for thousands of years before they planted the crescent on the Indian soil Abu Haneefa and Abu Yusoof and their other great Jurists, who thought and wrote under the early Caliphs, made little impression, at all events, no permanent impression, on the Indian fiscal system The crescent was floating in the air triumphantly marking the conquest by the followers of the Prophet, but they introduced no changes in the conquered country except such as necessarily followed a Government headed by men professing a religion almost diametrically opposed to the Brahminical creed.

The Aryans were essentially agriculturists and cultivators and, as we have seen, they took pride in the art in which they excelled the aboriginal races around them It was not then a disgrace, a cause of shame,

Subletting
originally
unknown

¹ षष्ठाशमाक्

² अतएव राज्यान्तराधिकारिणः सकाशात् अन्यनृपतिना क्रीते राज्यान्तरादौ विक्रीद्विस्त्वः सजातीय करग्रहणीपयोगि स्वत्वमेव तस्य जायते ।

Srikrishna on Dayabhaga.

as unfortunately it now seems to be, to hold the plough and "break the stubborn glebe". In those early days there must have been many a Cincinnatus in Aryavarta. But this state of things could not last long. Either from necessity, or from indolence, or from an abundance of Sudra labourers, enbletting soon became common. In *Thakurani Dasi v Bisweswar Mukherjee*,¹ Justice Campbell, afterwards Sir George Campbell and Lieutenant Governor of Bengal, is reported to have expressed the same opinion. "The primitive state of Society, which gave the first occupier a right to continue in occupation and no more could not possibly last long. Complications must necessarily arise and did as a matter of fact arise, and Hindu sages had to grapple with the relations which the more developed state of things required them to deal with. Narada and Parasara had copiously to deal with questions on the relationship of landlord and tenant. I propose to deal later on with the rights of cultivators and the share of the produce which they had to give to the owner of the land."

Intermediate
tenures later
creation

Intermediate tenures also were apparently unknown in earlier days. The text books deal only with the right of the owners of land and cultivators. Intermediate tenures must have come into existence in a more developed stage of society. Even the Mahomedan Government and the British Government, in its earlier days, as will be seen later on, were unwilling to recognise as valid the creation of intermediate tenures.

Cultivation
insisted on.

Cultivation of land was in those early days strongly insisted upon and penalties were prescribed for non cultivation by ralyats. This was a matter of necessity in those days when population was small and the extent of uncultivated area very large. Vyasa says—"If a man after taking a field with the object of cultivating it fails to do so either himself or through the

Vyasa.

¹ B. L. R. 15 p. 101 Vol. 202 sc. 3 W. R. (Act 1) 29.

agency of others, he should be made to pay to the owner a proportionate share of the corn which the field could have yielded if it were cultivated and, in addition, a fine to the king ”¹ Narada also has laid down that “when a field is abandoned by its owner and the same is cultivated by another without opposition, the cultivator is entitled to the whole of the produce and the owner would not get back the land without paying the cost of the clearance and cultivation ”² So Yajnavalkya says — “When a man does not cultivate, either himself or by means of others, he should be made to pay to the owner of the field the amount of grain which the field would have yielded if it had been duly sown with crops ”³

Narada

Yajnavalkya

I cannot leave this part of the subject without noticing the so-called Village Communities They have been said to be “little commonwealths, independent, self-acting, organized social groups” Sir Henry Maine, in his well-known work on “Village Communities in the East and the West,” has given them such an importance in the history of the growth of ideas about legal rights in land, that no essay on Land Law would be complete without something being said on them The part supposed to have been played by them in the formation and development

Village communities

¹ चेतृ गृहीत्वा यः कश्चित् न कुर्यात् न च कारयेत् ।

स्वामिने तत्फलं दाप्यो राज्ञे दण्डं च तत्समम् ॥

Quoted in Vivádaratnāṅkara

² “विकृष्यमाणे चेतृ चेतृकः पुनराव्रजेत् ।

खिलोपचारं तत् सर्वं दत्त्वा चेष्टमवाप्नुयात् ॥

Narada Smṛiti Chap XI 24

³ “फालाहृतमपि चेतृ यो न कुर्यात् न कारयेत् ।

स प्रदाप्योऽकृष्टफलं चेष्टमन्येन कारयेत्” ॥

Yajnavalkya Bombay Edition p 218

of society and ideas as to proprietary right to land is a matter of very great importance and I would refer you to that admirable book for a fuller study of the nature of Village Communities and their status as political units. Each of these communities or *guilds*, if I may use that word, was governed by a council of Elders who were called *mandals pradhans* or *jeet raiyats*. Each had its accountant or *patwari*, watchmen or *chowkidars*, a family of priests, a family of astrologers, a smith, a barber, a potter and a washerman. In the larger of these communities families of physicians, minstrels and musicians were also to be found. Thus each community could supply to its members the ordinary demands of life independent of the rest of the world. The headman, assisted by arbitrators or the council of elders, administered criminal justice on petty offenders and decided questions about civil rights amongst the members of the community. The sentences and decrees of these village tribunals were enforced as mandates of constituted courts of justice, the force of public opinion and the fear of being cast out of the community having been sufficient motives for obedience. They had also duties which municipal commissioners of the present day have. Each community had a public temple dedicated to *Siva Dharma* or *Kali*, and the meetings of the Council of Elders used to take place in the temple or somewhere near it. But it is a matter of surprise that our *Dharma Sastras*—texts and commentaries—make no reference to these communities. These works, the records of early life and thought, afford us little assistance in tracing the history of the rise and growth of these interesting groups.

Their Importance

In Bengal proper village communities existed and do still exist in a dismembered condition but in the North western Provinces they are to be found even now in a complete form. It is difficult however to say what the importance of these communities was in relation to rights

in land. The fact that they were political units, that the headman or council of elders was occasionally responsible to the Raja or the King for the *king's share* of the produce of the village, would not make the land the common property of the villagers as a body. There is, as far as I have been able to gather, no reason to believe that there was any communal idea or idea of common or joint ownership of land current among the members of any Village Community. The different families that occupied or cultivated the lands of the village were not the descendants of the same parents and there was no necessary kinship amongst them, as has sometimes been erroneously supposed. These families frequently belonged to different *gotras* and to different castes, and if the members called each other cousins, it was not on account of any relationship by blood or marriage. Nearness of residence and familiarity arising therefrom created a semblance of propinquity, and a stranger, a European, may be led to think from a cursory glance at the outer surface that the members of the community were connected by blood or marriage, generations back. But deeper insight would at once show that there was no reason to believe that there was any other connection amongst the members than the social tie, which must necessarily exist amongst a number of men living close to each other. Of course one community had lands and land marks distinct from those of another, but each family had rights in the land in its occupation well recognised and distinct from that of another. In the settlement of land revenue in Bengal there was not a single settlement with a village community. The number of permanently settled estates in Bengal and Behar at the end of the official year 1892-93, was 1,34,789. Not one of these was a settlement with a village community as such, not even a settlement with a village headman as representing a village corporation.

Each family
was proprietor

The truth seems to be that whatever the social and political significance of these village communities was, whatever the part they played in the progress of civilization they had not much to do with legal rights or the conceptions about legal rights of the owners or occupiers of lands, of individual members or families. Each of these families had its own piece or pieces of land for homestead and cultivation and the family was the owner thereof. The common grazing ground and the common water course, the village temple and the village gods were communal property in which the families were interested in common but beyond that there seems to have been no unity of proprietorship. Each family cultivated its own land, as it had done for years, nay for centuries, and under certain circumstances the interest which they had in land was transferable. The family could sublet land or get it cultivated by hired labourers. There were restrictions no doubt but those imposed were not of a character that would indicate any detraction from proprietary right. The restrictions were for the convenience of the neighbouring holders of land or other members of the community. They were in the nature of the right of pre-emption.

Each village
had defined
boundaries.

Each village, however had, as I have already stated, defined limits or landmarks. Yajñavalkya speaking of boundary disputes says that they are to be decided by old men chiefs and others¹. The venerable com

¹ सीधी बिनाई येदस सामना सविदाद ।

बीया सीमासमाना ये सर्वे च वनमीचरा ।

Yajñavalkya Bombay Edition p 213

In boundary disputes the following persons are to ascertain the respective limits of fields and villages as indicated by the natural elevations trees, dams mole hills husks bones and masses of charcoal buried underneath and edifices of worship viz old men peasants tillers of contiguous fields, rangers in the woods and the inhabitants of the neighbouring villages.

mentator Vijnaneswara adds that these disputes might refer to provinces, villages, fields and homesteads,¹ indicating thereby that each village had its boundary line and each family its fields. Narada² has an entire chapter on boundary disputes, but he deals more largely with disputes amongst the members themselves of the same village. Vrihaspati similarly devotes a chapter of his *Sutras* to this subject, and he begins by saying—"Hear the laws concerning boundaries of villages, fields, houses and so forth." I would not tire your patience with quotations of well known texts from the *Manava Dharma-sastra*. Sir Henry Maine when speaking of Village Communities in the East seems to suppose that these peculiar groups were referred to by Manu, "though," he says, "the English found little to guide them to their great importance in the Brahmanical codified laws of the Hindus which they first examined." But beyond certain statements as to boundary-marks and the procedure as to determining them and certain other matters to which I shall presently draw your attention, I have not been able to find anything in the *Smṛiti* to lead me to believe that the great sage had the idea of the property of Village Communities being, in any way, communal.

Each village had its grazing ground for the cattle of all its residents and cultivators. It was common property and none had the right to appropriate any part of it for purposes of cultivation. Manu³ has laid down that grazing grounds are the common property of the village, and the people encroaching upon them are liable to punishment. Yajñavalkya also lays down substantially the same rule, and the author of the *Mitākshara*, commenting on the passage, says—"A por-

Grazing
ground was
common
property

¹ Chap. XI

² Chap. XIX, p. 351

³ Manu, Ch. VIII

tion of land should be left uncultivated for the grazing of cows" ¹

Agricultural
lands not
common
property

These and similar customary rights which Village Communities had could hardly be construed as shewing that at any stage of the history of these Communities the entire land occupied or cultivated by the villagers was considered in the common property. Teutonic or Scandinavian Village Communities no doubt, resembled in many respects similar institutions in India, but there were marked differences as regards the rights of individual members. As I have already said, these latter were at least at their later stages merely unions for political purposes—protection from outside enemy and peaceful domestic government. As to Bengal proper, Sir Henry Maine says that from causes not yet fully determined the village system has fallen into great decay. For all practical purposes therefore a detailed consideration of the history and rights of the Village Communities is unnecessary in these lectures.

Acquisition
of right by
adverse
possession

Possession has always played an important part in all systems of jurisprudence in the acquisition of right in land and the first tiller might lose his right by adverse possession by another. It is quite clear

¹ यामिञ्चया सीमन्तवारी भूमिराजवसिष्ठेन वा ।

विजससीव पुण्यानि सर्वदा सर्वदा इरीत् ॥

गवाहीनां मन्त्राचार्यं विमानपि भूमागोऽज्ज्ञः परिवससीय इत्यत्र ।

यत्तु मत्तं पटीचाही यामि येनाकारं भवेत् ।

ये मत्ते खर्चटम् स्वात्मगरम् चतु मत्तम् ।

Yajñavalkya Bombay Edition p. 221

A cert. in portion of the land is to be set apart as pasture according to the will of the village or the direction of the king. The twice born may glean fuel, flower or grass from any place and at all times.

Field in a village are to be ordinarily separated from one another by an intervening uncultivated space of two dreds (i.e. 200 yards) on all sides. If the village abound in thornbush (prickly) to amount to 200 dhas (400 yds) the space of population towards the space to be left open shall be 100 dhas (200 yds) or 800 yds. See also Manusm. Ch. VIII 237.

that during the period when the *sūtras* were composed by the venerable sages with whose names you are familiar, right by possession and effect of adverse possession as creating prescriptive right were well understood and recognised. The Vishnu Smṛiti lays down —“ If possession has been held of an estate by three (successive) generations in due course, the fourth in descent shall keep it as his property, even without a written title ”¹ Vṛihaspati has an entire chapter on title by possession. He says—“ When possession undisturbed (by others) has been held by three generations (in succession), it is not necessary to produce a title, possession is decisive in that case ”² The next three slokas repeat the same idea, and in the thirty-first and thirty-second slokas uninterrupted and longstanding possession is considered to be necessary to create title by possession, and the sage adds—“ A witness prevails over inference, a writing prevails over witness, undisturbed possession which has passed through three lives prevails over both ”³ In another sloka the sage seems to imply that a period of thirty years is time enough. “ He whose possession has been continuous from the time of occupation, and has never been interrupted for a period of thirty years, can not be deprived of such property ”⁴ I can not here resist the temptation of quoting, though it is out of place, another verse from the same *sūtra* in which the doctrine of estoppel by conduct is recognised as creating title. “ He who does not raise a protest when a

Estoppel by
conduct

¹ विभिरेव तु या मुक्ता पुरुषं भूँययासीति ।

लेख्याभावेऽपि ता तत्र चतुर्थः समवाप्नुयात् ॥

Institutes of Vishnu Chap V 187, Jolly p 40

² Chap IX, V 28, Jolly p 313

³ Chap IX, V 29, Jolly p 314

⁴ Vṛihaspati, Chap IX, V 7, p 310

stranger is giving away his laoded property to his sight can not again recover the same, even though he be possessed of a written title to it"¹ Narada also refers to possession for three generations;² other authors of the Sutras have reduced the period to twenty years "If a man knowingly and without complaint allows another, who is in no way related to him, to be in possession of his land for twenty years and of movable property for ten years, his right to the same becomes extinguished"³ Vyasa, whose authority in these matters is very high is also of opinion—"If the laod of one is possessed by another for twenty years, his right to sue for possession ceases."⁴ Mitra Misra in his *Viramitrodaya*, a work of great authority in the Benares school, giving his own gloss on these texts comes to the conclusion—"If a person whose land or movable property is enjoyed by another for more than twenty or ten years respectively, if he is not an idiot or a minor his right to sue for the recovery of the same becomes barred and the possessor acquires a title"⁵

Other sages, notably Katyayana, are of opinion that *asmartha kala* (time immemorial) creates title Raghu oandana who was a contemporary and fellow student of Chaitanya and who lived in the fifteenth century

Period necessary to create title by adverse possession.

Vrihaspati, Ch. IX, V 9, p 310

¹ अन्वयेन तु नत् &c

² पञ्चतीक्ष्णतीक्ष्णौ चोर्निर्दिष्टमिति वाचिणी ।

परिच सुम्पमानाया अनन्त दसवाचिणी ।

Vajrasalkya p. 125. Bombay Ed.

³ अर्थादि निवृत्तिं यस्य सुम्पन्ना तु परे रिह ।

सति वाचि समर्पस्य सत्तु विह न विध्यति ।

⁴ अत्रकवेदपीठणी विषये चाल सुम्पन्ने ।

मयं तत् सुवचारेण भीमा महानकति ।

Viramitrodaya Jivananda Vidyasagar's Edition. p 210

after Christ in Nuddea has attempted to reconcile the apparently conflicting texts, and has held that according to all authorities, "before the lapse of twenty years the possessor's right accrues only to the things produced by his own labour and after that period his right is perfected" ¹

We thus see that though originally the first occupier of land was considered as the true owner and entitled to the usufruct, he or his heirs could lose the right on account of adverse possession by another, that is to say, limitation in the language of Indian law ² The period of adverse possession as creating right or barring remedy was originally considered to be time immemorial or three generations It was reduced to thirty years, and later on, the most approved authorities considered twenty years as the legitimate time to perfect possession into prescriptive title The law of England as to acquisition of right by prescription passed through similar stages, until the period was reduced to twenty years, and quite recently to twelve years

Extinguishment of right by limitation

The right to enjoy the usufruct by the first occupier or his legal heirs became in course of time alienable It would seem that originally it was only heritable but not alienable. *Vijnaneswara*, in his well known commentary on the text of *Yajnavalkya*, expounded what was apparently in his days the idea as to non-alienability of land when it was occupied by the members of a joint family and was ancestral But the rival idea as to alienability was making its way, and *Vijnaneswara* himself admitted that right as exercisable under certain circum-

Non-alienability of land in ancient times.

¹ "विंशति वर्षात् पूर्वं स्वकृतिसाध्यकर्षणपालनाद्यै रुत्पन्नद्रव्ये एव स्वत्व, तत्तत् कालपरतस्तु भूमौ गवादिधने च स्वत्वमिति ।"

Vyavaharatattwa, Madhusudan Smritiratna's Edition p 32

² Act XV, of 1877 Sec 28

tances Jimutavahana, however entirely discarded the theory of non alienability and according to him every owner of land if a male had the full right to transfer the same either by gift or sale. The *sutras*—the prime source of Hindu law and the best means we have of knowing original Indian ideas on any subject—were slow to recognise the right. You will find in them texts in which the sages held that land once acquired was property which was for the benefit of all generations to come.

Mahomedans
had their own
system of
Jurisprudence.

Such or nearly such were the principal juridical theories prevailing in India as regards ownership of land. In came the *Mahomedan* conquerors about the beginning of the thirteenth century. They had their own system of jurisprudence which differed in many respects from what they found to be in existence in India. But their *doctrines of fiscal system* were of recent date. Abu Haneefa and his two disciples Abu Yusoof and Mahammad had done much to consolidate and give a turn to the theories and practices of the earlier Caliphs but considerable development was still needed. When the followers of Mahomed established themselves in India they found that they were amongst a nation just as the Romans had found themselves amongst the Greeks. The Hindus had a developed system of Jurisprudence and a contest both as to theories and practices between the Hindu and Mahomedan nations was almost inevitable. The result however has shewn that in the contest the Hindu principles survived. Akbar's Hindu proclivities are especially well known. Yajnavalkya¹ has said that as soon as a country is brought under subjection the people ought

¹ यजिन् ईमे य जायसी म्बरहारा कुलपिति ।

तदेव परिवर्ज्यो-मो यदा ययमपायत ॥

to be governed according to their own laws, manners and customs This is a well-approved rule of international jurisprudence, and the Mahomedans, however much they hated any rules or principles except those laid down in the Koran, were compelled in India to accept, in many instances, the ancient Hindu principles They respected possession, and the strict rules applicable to infidels, according to their own jurists, were not applied to India The principle of Musalman Government was-- "If the Imam conquered a country by force of arms, he was at liberty to divide it among the Musalmans or he might leave it in the hands of the original proprietors, exacting from them a capitation tax called the *zezyat* and imposing a tribute upon their lands known as the *khiraj* The *oosher* (*tithe*) should be imposed only upon believers"¹ According to this theory, the conqueror was considered as the proprietor of the land, and the doctrine of Abu Yusoof is that the *khiraj* should be levied as a punishment, the land being considered as lapsed for infidelity The *khiraj* according to the Mahomedan doctrine varied with the nature of the land, detailed rules being laid down both by Abu Yusoof and Mahammad² In India, however, no land was distributed amongst the Musalmans Small portions might have been given to soldiers as *jaigirs* and *aymas*, but

Mahomedan rules applicable to infidels not applied in India

Khiraj

"Let him establish the laws of the conquered nation as declared in this book" See also—

असायानिच कुर्वीति तेषा धर्मान् यथोदितान् ।

रत्नैश्च पूजयेद्देन प्रधानपुरुषैः सह ॥

Manu Chap VII v 203

“पर देशाव्याप्ती तद्देश धर्मान्नीच्छिन्यात् ॥

Vishnu Ch III v 42

¹ Hamilton's Hedaya Vol II p 209

² Hamilton's Hedaya, Vol II, p 207

Commuted
into money
rent.

these were generally waste lands. They levied the *khiraj* and applied the theory of proprietorship of the king in the soil, but, as I shall presently show the *khiraj* was soon commuted into money rent and, according to another theory of Mahomedan jurisprudence the commutation of a share of the produce into a fixed money rate took away the sovereign's proprietary right. The practical result was the same as if the king was not the proprietor of the soil but was only entitled to rent. When rent was once fixed, there was no doctrine of increase from the *unearned increment*, and the sovereign's right was fixed for ever. The customary rent which had prevailed under the Hindu kings was no doubt superseded. A new custom in increased proportion was established, but there was nothing like competition rent.

The imposi-
tion of the
khiraj did
not take away
the proprie-
torship of the
cultivator

The imposition of the *khiraj* did not deny the existence of property in land and take away the proprietorship of the cultivator. His right was alienable and "the lands cultivated continued to be the property of the inhabitants who might lawfully sell or otherwise dispose of them". The sovereign was entitled only to a share of the produce, which could be even as much as a half. But in India the *khiraj* was never formally levied though an attempt was made to do so by Alla-uddin in the beginning of the fourteenth century. When the sovereign's share of the produce was converted into money rent, the liability became personal, the cultivator having higher rights as regards the land itself. In the words of the *Fatwa Alungiri*, 'by the imposition of the *wasifa khiraj* the sovereign ceased to be a partner of the cultivator'. No permission of the sovereign was required to validate alienation. I have already adverted to the original Mahomedan doctrines as to waste lands. The first cultivator was the

¹ Baillie's Land Tax. 22

² Tagore Law Lectures 1874-75, p. 48

proprietor in virtue of having brought the land into a state of cultivation"¹ He was bound to pay only the *tithe*, and, under some circumstances, the *tribute*. Thus, on the whole, the Mahomedan principles of fiscal government did not practically vary from the Hindu.

But causes other than the mere introduction of the Hanifite doctrines were at work to bring about the assimilation of the Mahomedan to the previously existing Hindu systems of fiscal administration. The Mahomedan conquest of India was never complete. The battle field on the Caggar, where Prithwiraj and his brave followers sacrificed themselves to the cause of independence, broke down the imperial power of the Hindus, and most of the small principalities, with which Northern India was studded, yielded without struggle, and accepted the Mahomedan yoke agreeing to pay tribute. It was not until the days of Akbar that any serious effort was made for the collection of the *khiraj* direct from the cultivators. Even then the hereditary chiefs who had long ancestries to tell were not disturbed. They got *sanads* which provided for payment of nominal sums as rent (*khiraj*). The apathy and the carelessness of the Nabobs brought about a system of non-interference with the internal management, whether fiscal or judicial, of the various provinces of the empire, and the Hindu Rajas or Zemindars, call them by what name you will, took the fullest advantage of their position. Opportunity was afforded for the progress and development of indigenous systems of thought, language, literature and law, unchecked and unfettered by Semitic influence. It is a curious phenomenon in the history of the Indian people, a history which, I regret to say, has not yet been written, that, notwithstanding the alleged misgovernment and tyrannical sway of the followers of the

Assimilation
of the Hindu
& Mahome-
dan systems

¹ Hamilton's Hedaya, Vol IV, p 130

Prophet in India, social and religious ideas, legal and philosophical conceptions of the Hindus and even some of the vernacular languages, made, during the centuries just preceding the rise of the British power in India, an extraordinary progress without any encouragement from the ruling power. The customs, usages and customary laws of the Musalman sovereigns made little or no impression on the people except at the capitals and large cities where only their influence was most felt. Both in Europe and in India the fifteenth century was a period of rapid changes and development in religion and literature not less in legal conceptions. The changes in India were however not revolutionary and bloody as they were in Europe. The Musalmans intolerant though they might be did not persecute the Brahmanical Hindus or any of the various sects that sprung up in that century, to the same extent as the Roman Catholics did the Protestants or the Protestants the Roman Catholics.

Practical independence of the Zemindars.

The Hindu Rajas and Zemindars though theoretically they were merely collectors of land revenue had to perform almost all the functions of the sovereign. They heard and decided cases, civil and criminal and enforced obedience to their decrees and sentences. In the same way as sovereigns. They had their own law-officers or *Pandits*. The police administration was under them. In fiscal matters their authority was supreme the interference by the ruling power being really few and far between. The necessary result was the practical continuation of the old Hindu systems. It was at this period that a number of glosses and commentaries on the *sutras* were composed and published apparently for the purpose of facilitating the administration of justice, which gave fresh life to Indian legal conceptions. The Hindu kingdoms in the Deccan notably Bijayanagar did much for the revival and advancement of Sanskrit learning, literature and law.

I shall close this lecture with a few words on the history of the revenue settlements made under the Mahomedan rulers and on the advent of the British. Under the vigorous despotism of Allauddin Khilji¹, an endeavour was made to increase the land tax (*khiraj*) and to exact it more vigorously, and settlement was, in some provinces, made with the cultivators direct. Sher Shah,² a prince of consummate prudence and ability, introduced during his short reign many improvements in the civil government, and the settlement of land revenue was one of them. His son Selim Shah followed him and made some further improvements. Immediately after, followed a period of contest between the Afghan and the Moghul. The revenue system of Akbar is, however, celebrated for the benefits it conferred on India, though it was no new invention. Akbar's scheme was to carry out the previous system into effect with greater precision and correctness. "It was," to use the words of a learned historian of India, "only a continuation of a plan commenced by Sher Shah."³

Revenue settlements under the Mahomedan rulers

Allauddin Khilji

Sher Shah

Selim Shah

Akbar

I shall not detain you with a description of the revenue system of Akbar, known more generally as Raja Todar Mal's reform. You will find every thing that can be said with reference to this matter elaborately dealt with in the Tagore Lectures for 1874-75, and in almost all the bigger histories of India. I need only add that Raja Todar Mal entirely ignored the distinction made by Abu Haneefa between *Oosher* and *Khiraj*, between Mahomedans and Hindus. Instead of the sixth levied by Hindu Rajas, the rate was increased to a fourth, and occasionally to a third. An average of ten years was taken, and the cultivators were allowed to pay

Todar Mal's reform

¹ 1295 to 1316 A. D.

² 1540 to 1545

³ Elphinstone's India 5th Ed 541

money rent. The settlement was nominally for ten years. But there are reasons to believe that the settlement was never completed in Bengal. Many of the ancient Rajas of Bengal held out, and their lands were never measured or assessed. They paid only nominal tribute or revenue to the imperial exchequer. Raja Todar Mal, it is said, had ignored the zemindars but those whom he had ignored in Bengal were few, and they were soon restored to power by the influence of circumstances.

Rights of
cultivators

The rights under Mahomedan settlement, of the class known as zemindars and the rights of the cultivators are matters of great importance as the principles of the settlement of Land Revenue under the Anglo Indian Government are to a great extent based on them. I propose to say a few words on the rights of the zemindars later on. The rights of the cultivators is a question of great difficulty. The distinct revival, in the reign of Akbar, of the old Hindu system under his Hindu minister, would seem to imply a revival of the principle which distinctly recognised the right of cultivators to hold on and enjoy the usufruct, and even to alienate and sub let. It was, to all intents and purposes a *proprietary right* subject to the payment of a definite share of the produce which since Raja Todar Mal's settlement, could be called customary rent. Ejectment was unknown except for non cultivation or continuous non payment of rent. Competition rent was never thought of. The very fact that *abwabs* or illegal cesses were now and then levied shews distinctly that the *rajats* believed that rent was fixed and unalterable except under very peculiar circumstances. To use the words of the framers of the Regulation Code of 1793 — The ruling power was entitled to a share of the produce of every bigha of land — not however as proprietor of the soil but as responsible for the protection afforded to the subject.

Preambles to Regulations XIX and XXVII of 1793.

The victory of the English army at Plassey established in Bengal the nominal vice-royalty of Mir Jáfár and the actual sovereignty of a company of English merchants. This company had, on the last day of the sixteenth century, obtained from Queen Elizabeth the exclusive liberty of trading in the East Indian seas, and were attracted to Surát and the other Malabar cities for the purchase of cloth and calico. In those days, only three hundred years ago, India was, perhaps, the only country that supplied the world with piece-goods. Manchester has now practically taken the place of Indian cotton manufacturing cities. These merchants were bent only upon commercial aggrandisement, and had, until the year 1757, little to do, in Bengal, with the government of a nation, its laws or customs. An accident, however, made them the rulers of a people dissimilar from themselves in almost every respect. On the 12th August 1765, they were compelled under peculiar circumstances to obtain a formal recognition of their title as Dewan of the titular Emperor of Delhi, on an agreement to pay an annual sum of twenty-six lacs as revenue of Bengal, Behar and Orissa. They knew not at the time what to do for the proper administration of justice, and were, therefore, compelled to introduce in India a system of jurisprudence with rules of procedure and notions of proprietary right, which may well be characterised as a parody of what they then had in England. There was also another disturbing influence at work at the same time. Having obtained the Dewany from the Great Moghul, they thought that they should follow the Musalman system. From the Mahomedan financial system, therefore, they claimed the inheritance of a right to seize upon an unduly large portion of the gross produce, and coupled the same with their own doctrine of the proprietary right of the sovereign by reason of conquest. The period of nearly seven years from the grant of the

Sovereignty
of the East
India Com-
pany

The Dewany

Influence of
the Mahome-
dan system

Dewaooy was one of utter darkoess,' especially on account of the double government—the Dewaooy of the Eoglish and the Nizamot of the Nabob of Mursidabad. The complications resulting from the operation of dissimilar & may say inconsistent fiscal systems brought about a state of things which may be said to be chaotic. 'The greed of the Board of Directors of the East India Compaoy and the no less greed of their servants in Beogal together with the impoverishment and depopulation caused by the terrible calamity of 1770, made confusion worse confounded. Under such circumstances the British Parhameot interfered¹ but even the genius of Warreo Hastings was not sufficient to bring order out of chaos.

Proprietary
right of the
Government.

The English in India started with the assumption that all the soil belonged in absolute property to the sovereign and that all private property in land existed by his sufferance.² This was as we have seen the doctrine of Abu Haneefa and accorded with the English theory that 'the *proprietas* or actual ownership of the land always resided in the sovereign.'³ The existence of private property in land which is the fundamental doctrine of Hindu jurisprudence and which as we have seen even the Mahomedao government in India did not put out of sight was entirely ignored. With this idea the Government⁴ in 1793 transferred in perpetuity a vast and then unmeasured quantity of land to a class of men who were and are known as *zemindars* and the property in the soil was formally declared to be vested in them.⁵ The remaining quantity of land cultivated or waste continued to be the property of the *state*.

¹ 13 Geo. III c. 63.

² Maine's Village Communities Lec. II.

³ Stephen's Blackstone Book II Pt. I Ch. II.

⁴ Preamble to Reg. II of 1793.

Taking this theory of proprietary right as the basis, the subject of these lectures may be broadly divided under the following heads *viz* —

- 1 Khás Maháls
- 2 Revenue-free Estates
- 3 Permanently and Temporarily settled Estates
- 4 Intermediate Tenures
- 5 Raiyatí Holdings

LECTURE II

KHAS MAHÁLS

Khás
Mahál do
finod

' A *Khás Mahál* is an estate in the private possession of the Government as proprietor ' Waste lands not included within the area of any permanently settled estate, islands thrown up in large navigable rivers resumed revenue free lands, and settled estates which have lapsed to Government are included within this definition In the Bengal Tenancy Act (VIII of 1885) Government *khás maháls* are "estates"¹, and the Government is a proprietor owning estates² The Government is also a "landlord" like other landholders³

Calcutta.

Of the *khás maháls* Calcutta the metropolis of India deserves our first attention At the date of the Dewany (12th August 1765) the East India Company held by purchase the taluqdari right of Calcutta and of the adjacent villages Sutanati and Gobindpur subject to an annual payment of Rs 1195 as revenue to the Great Moghul The purchase was made in 1698 The lands of these three villages were partly occupied by the Company but the major part was held by tenants who paid rent to the Company as taluqdar

The ground rent payable to the East India Company is ³ *revenue*⁴ within the meaning of 21 George III c. 70 and the Supreme Court had no power to interfere with its as

Field's Introduction to the Regulation of the Bengal Code p. 41

Sec. 3. Sub-Sec. (1)

Sec. 3. Sub-Sec. (2)

Sec. 3. Sub-Sec. (4)

¹ Act XVIII of 1850 and Act XVIII of 1856

assessment and collection,¹ and the High Court in its Ordinary Original Civil jurisdiction has likewise no power in these matters.

There were a good many revenue-free tenures in Calcutta, and lands held exempt from assessment for sixty years were declared by the Act of 1850² valid lakhiraj. The revenue-paying holdings in Calcutta are *estates* in the ordinary significance attached to the word. The provisions of Bengal Act VII of 1876—the Land Registration Act—have been applied to all holdings, revenue-paying as well as revenue-free, though most of the other incidents of estates in the mofussil do not hold as regards them. It is said that there are about ten thousand holdings or estates in Calcutta. The Government-claim for land-revenue has priority over all other claims on the land,³ and the amount is leviable by distress, the period of limitation being six years.⁴ The Government has no proprietary right in these holdings, the right is simply to receive fixed sums as revenue or quit-rent. The proprietary right is in the holders. The tenure of land is of the nature of free-hold, and though *pottahs* are often taken from the Collector of Calcutta, they are not considered as muniments of title.⁵

Its revenue-system

It is curious to find that such of the lands in Calcutta as were assessable, but had not been assessed before, were declared assessable at the rate of three annas per cottah, that is to say, three rupees and twelve annas per bigha.⁶ This low rate of revenue would seem to be surprising to any one familiar with the assessment of land revenue in other parts of Bengal, but land revenue or land tax is very low in England, and Calcutta had the advantage of being governed under the rules and princi-

Rate of assessment

¹ Act XXIII of 1850, Sec 12

² Act XXIII 1850, Sec 2

³ Act XXIII 1850, Sec 6

⁴ Act XXIII 1850, Sec 7

⁵ *Gardiner v Fell*, 1 M I A 299, *Freeman v Fairlie*, 1 M I A 305

⁶ Act XXIII of 1850, Sec 2

plies that prevailed in England before the passing of the Regulating Act of 1773¹

Sutanuty

After the battle of Plassey Mir Jáfár granted a sanad for the free tenure of these villages and six hundred yards of land without the Maharatta ditch. The rents of these mnuzas were *forgiven*. Later on and in the year 1778 the Company transferred to Maharajah Nobo Kissen of Snvabazar, in the town of Calcutta the taluqdari right of Sutanuty fixing the annual rent at Sicca Rs. 1237.

Incidents of
tenancy

The holdings in taluq Sutanuty, which form nearly two-fifths of the town, are generally rent free. The rent paying holdings which have existed from before the year 1778 are all permanent, hereditary and transferable. The rent charge is so small that it may be said to be nominal. The rent is realisable by suits in the Calcutta Court of Small Causes provided the amount does not exceed its pecuniary limits. The taluqdars of Sutanuty have not by the terms of the grant, the right to demand or receive a larger amount of rent than "what has been customarily received viz. Rs. 3 12 as per bigha". By the terms of the grant the power of enhancing rent beyond that limit was taken away. But this restriction in enhancement can only apply to lands held under taluqdari right.

†Fixtures.

I may here mention some of the peculiarities in the law relating to landlord and tenant in Calcutta—I mean the part of the town which is within the Ordinary Original Jurisdiction of the High Court*. The rules of law laid down in the Indian Contract Act (I of 1872) and the Transfer of Property Act (IV of 1882) must now regulate the general incidents of tenancy in Calcutta. The several Tenancy Acts passed for the Bengal Provinces have no application here. In the

¹ 13 Geo. III c. 63

* For the definition of Calcutta see Proclamation by the Governor General in Council, dated the 10th September 1791.

absence of express contract or any provision in the Contract and Transfer of Property Acts, the High Court has to apply the Hindu Law in the case of Hindus, the Mahomedan Law in the case of Mahomedans, and the principles of justice, equity and good conscience which, according to the majority of the English Judges who preside over our superior courts and the English lawyers who practise there, are the rules of English law with almost imperceptible variations. Section 17 of 21 Geo III c 70 provided that "as to rents and all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos".¹ Until the passing of the Indian Contract Act and the Transfer of Property Act, the Supreme Court, and then the High Court in its Ordinary Original Jurisdiction were bound to act in all cases according to the direction given in the statute of 21 George III, but for causes, which are not far to seek, the law applied was the English law, except in rare cases. In *Russick Lall Mudduck v Loke Nath Kunmohar*,² the plaintiff had been ejected by a decree of the Calcutta Court of Small Causes from the land held by him as a tenant under the defendant, and claimed to be allowed to pull down and remove the buildings erected thereon by himself or his predecessors in title, or in the alternative, to be paid compensation in respect of them. Wilson J applied to the case the doctrine of Hindu law as expounded in the judgment of the Full Bench in *In re Thakoor Chander Paramanick*,³ declining to apply, as amongst Hindus in Calcutta, the English maxim *quicquid plantatur solo solo cedit*. In a later case,⁴ however, the Calcutta High Court threw considerable doubt

¹ See also Letters Patent of 1865, Sec 19

² I L R 5 Cal 688

³ B L R Sup Vol 595,

⁴ *Juggut Mohini v Dwarkanath* I L R 8 Cal 582 See also *Jeshwada Bai v Ram Chandra* I L R 18 Bom 66

both as to what the true rule of Hindu law is and its applicability to the town of Calcutta. The learned judges who decided the latter case were of opinion that the texts of Hindu law referred to in *In re Thakoor Chunder Paramanick* did not lay down any rule as to substantial structures.

Huts.

Huts came within the definition of immovable property¹. In *Nattu Misah v Nand Ram*² a Full Bench of the Calcutta High Court held that they were not saleable in execution of a decree of a Small Cause Court and in *Kally Parsad Sing v Hoolas Chund*³ the High Court following the Full Bench decision came to the conclusion that tiled huts were not "goods and chattels" and could not therefore be taken in execution of a decree of the Calcutta Court of Small Causes. But the right of a tenant to remove tiled huts built by himself was recognized and in *Parbutty Bewah v Wooma Tara Dabee*⁴ Macpherson J. was of opinion that a tenant of land in Calcutta was entitled by custom to remove huts. This was rather anomalous. The legislature had to interfere and section 28 of the Presidency Small Cause Court Act⁵ provides that huts which are removable at the termination of the tenancy should be deemed to be movable property. Tiled huts are thus saleable in execution of decrees of the Small Cause Courts at the Presidencies.

The Small Cause Courts constituted under Act XV of 1882 have other special powers in cases between landlord and tenant which are not possessed by similar courts in the mofussil. Rent for land is recoverable by suit if the amount does not exceed the Court's pecuniary jurisdiction though such suits are not cognizable by the mofussil Small Cause Courts.⁶ Suits

Act I of 1868.
10 B. L. R. 448.
Act XV of 1882

8 B. L. R. 508.
14 B. L. R. 201.
Act IV of 1857 Schedule II cl (8).

for ejectment of tenants and persons holding land by permission may, under the procedure laid down in chapter VII, be instituted in these Presidency Courts, provided the annual value of the property does not exceed one thousand rupees. Distress for rent is also allowed ¹

The district now known as the Twenty-four Perganahs, as it contains twenty-four pergunahs or local divisions, came to be held as a zemindari granted by the Nawab, but except the fifty-five villages or Dihī Panchannagram, the district of Twenty-four Perganahs was never dealt with as a *khās mahāl* It was, as we shall presently see, permanently settled in 1793, the tract of jungle-land known as the Sunderbands excepted

The Twenty-four Perganahs

Mir Kasim when made the Nawab, the feeble Mir Jāffār having been deposed, granted in 1760 the three districts of Burdwan, Midnapur and Chittagong to the Company as a cession for the support of the army, but the Company allowed the zemindars to collect the revenue as before, and these districts were permanently settled along with the rest of the province, so that the districts of Twenty-four Perganahs, Burdwan (which in those days included the district of Hughly), Midnapur and the cultivated portions of Chittagong, though acquired earlier than 1765, were considered since the date of the Dewany to be covered by the Imperial sanad

Burdwan and Midnapore

The Dihī Panchannagram was acquired by the Company in the year 1757 in taluqdari right, and has continued to be in the direct possession of the Government without the intervention of a zemindar. Readers of Indian History must be familiar with the facts connected with the grant of these fifty-five villages by Mir Jāffār and the pension to Lord Clive, and the charge subsequently brought against him on the ground of his accepting the pension

Dihī Panchannagram

¹ Act XV of 1882, ch VIII

†Holdings
in Dihl Pan-
channagram.

The holdings in Dihl Panchannagram are not all rent paying. A good many of them are rent free. The right of the Government to these holdings and the relationship between the Government and the land holders may well be expressed in the words of the Judicial Committee of the Privy Council in the case of *Gunga Gobind Mundal v The Collector of the Twenty four Perganahs*.¹ Speaking of right to the land in dispute in the case and the word property in land as used by the High Court, their Lordships say —

By the word property is here evidently meant absolute ownership, though it may be by a grant from the East India Company as the zemindars of the Twenty four Pergunnahs. The wellknown cases of *Gardner v Fell* and *Freeman v Fairlie* (1 Moore's Ind App Cases pp 299 and 305), and the observations of Lord Lyndhurst in the latter case on the subject of *Pottaks* exclude any supposition that such absolute ownership of lands by private persons could not exist at that time in that part of India as against any claim of the Government to possession of the lands. In the latter case his Lordship terms 'the rent' a *jumma* or tribute and says 'the *Pottah* therefore proves no part of the title, it is the conveyance that gives parties a right to claim the *Pottah*. The *Pottah* is evidence of title. If there were anything in the nature of the title of the Government to lands in the Twenty four Pergunnahs, or any usage or custom in force there which gave a less permanent interest to the possessors of proprietary right some authority for or some evidence of such a variation from and limitation of the general law should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to * * * The interest of the

' person in possession is not a limited but an absolute
 ' interest, the title to the lands is one inheritance, the
 ' title to the *khiraj* or rent is another Though these
 ' lands are treated as part of the *khás-maháls* yet there
 ' is no proof in this case of any relation of landlord and
 ' tenant ever existing between *Johnson* and the Govern-
 ' ment, *Johnson* appears to have been the absolute
 ' owner, and no reversion to have existed in the Govern-
 ' ment It is not the case of a lease at all, still less of a
 ' lease of temporary duration, it is the case of an abso-
 ' lute ownership of the lands, and the title of the Govern-
 ' ment rather resembles a seignory than that of a lessor
 ' with a reversion * * * There is no relation of Land-
 ' lord and tenant in such a case between the Govern-
 ' ment and the owner of the lands, who is the landlord,
 ' and not a *Raiyat* The Government has a title to the
 ' rent or *jumma* By whatever name it be called, the
 ' right and title is to the rent substantially, it does
 ' not include a right to the possession of the lands,
 ' though such a right might arise by forfeiture, or extinc-
 ' tion of the ownership "

On the 17th March 1824, the Dutch settlements of
 Dacca, Fulta, Patna and Balasore and the town of
Chinsurah were acquired from the Dutch government
They were ceded in perpetuity By Regulation XVIII
 of 1825, the town of Chinsura was annexed and made
 a part of Zillah Hughly, and the other factories were
 annexed to the districts in which they were situated
Chinsurah is also a *khás mahál* The rent of the hold-
 ings is fixed in perpetuity, the rates fixed being those
 which were prevalent when the Dutch acquired it from
 the Moghul government The Government order
 dated the 21st August 1828 lays down, "the sanads
 or *pottahs* granted by the Dutch government should
 be maintained, and that long possession should be
 considered to constitute a good title" The hold-
 ings in Chinsurah are now permanent except a few

The Dutch
 settlements

Serampur and Baranagar acquired from the Danish Government.

unsettled, concealed or wastelands, which however are insignificant Serampur and Baranagar were acquired from the Danish government in 1845 These are also khás maháls, the holdings being generally permanent hereditary and transferable like the holdings in Calcutta Panchannagram and Chinsurah These holdings are tenures within the meaning of Act VII (B C) of 1868 and rent is recoverable practically as revenue under the procedure laid down in that Act and Act XI of 1859 to which I shall draw your more particular attention later on Section 195 of the Bengal Tenancy Act (VIII of 1885) excludes from the operation of the Act the right of the Government to realise rent of khás mahál lands under these Acts and the Public Demands Recovery Act (VII of 1880) The holdings are frequently subdivided and the rent apportioned, so that each of these divisions may become a tenure by itself It must be remembered that these holdings or tenures are not considered to be permanently settled estates though in their incidents they very much resemble such estates The property of the holders is of the same nature as it is in Calcutta and Dibrú Panchannagram

The khás maháls in which the Government claims proprietary right properly so called, may be divided into the following classes —

Other Khás Maháls.

I Waste lands brought under cultivation since 1793 such as Halabad, Noabad, Taufir and Patilabad lands and not included in any settled estate

II Lands not permanently or temporarily settled including resumed revenue free lands lapsed and forfeited estates and Island churs

III Temporarily settled estates including Orissa and the Sunderbunds

IV Forest lands

Resumption Regulations.

In the year 1819 the attention of the government was drawn to lands which were not included at the

period of the Decennial Settlement within the limits of the settled estates. The tract of land known as the Sunderbunds and the *churs* or islands formed since the Decennial Settlement and other *halabad* (newly cultivated) lands, *patitabadi* and *jungle-būri* taluqs were dealt with in section 3 of Regulation II of 1819, but all waste lands included within the ascertained boundaries of permanently settled estates were left expressly unaffected by clause 1, section 31 of the Regulation. There were lands possessed by zemindars over and above what were originally included in the settlement, and such lands are called *taufir*, but nothing was definitely done until the year 1828 when Regulation III of that year was passed. By the rules framed under that Regulation *taufir* lands were especially dealt with, and officers were appointed to look after and settle them. New *churs* and jungle lands were declared to be the absolute property and at the disposal of the Government. Some portions of these lands were, after settlement of rent under the rules laid down by Regulation VII of 1822, formed into permanently settled estates, but large tracts of land newly reclaimed still continue to be Government property as *khás maháls*.

A large portion of the district of Chittagong was in 1793 covered with jungle, the clearances being chiefly in the level plains. By the year 1764 all the occupied lands had been measured, and when the Permanent Settlement of 1793 was concluded, it covered only the measured lands as they stood in 1764. All lands cultivated subsequent to that period are locally spoken of as *noabad* (newly cultivated). Regulation III of 1828 declared the absolute right of the Government to these *noabad* lands. They were assessed with revenue, and as new lands were brought under cultivation, fresh assessments were made. Between the years 1841 and 1848 all the *noabad* lands were surveyed, whether held by squatters, or taken by encroachment by the original

Noabad lands
and taluqs in
Chittagong

settlers known as *tarafdars*. The lands of the estates formed in 1793 were defined and separated, and the *noabad* lands were made separate taluqs but a large number was placed directly under the Collector and put under *khás* management. The *noabad* taluqdars are tenure holders entitled to retain possession on the terms of their leases. The settlement made in 1848 was for fifty years for lands fully cultivated, and for twenty five years for other lands. There was also in Chittagong a large number of small grants called *jungleburi*. Thus the district of Chittagong contains a very large number of little estates taluqs and *jungleburi* holdings, each with a kind of proprietary right different from that of the adjoining land and complications in cases brought before courts of justice are necessarily great. Old permanently settled lands *noabad* taluqs, resumed lakhiraj holdings assessed from time to time and lands temporarily settled are so intermixed with each other that lawyers and judges feel the greatest difficulty in solving intricate problems of fact and law as regards them. The repeated measurements and assessments made by the Government have however to a certain extent brought things into order. The cases of raiyats holding lands under *tarafdars* or new settlement holders of *noabad* lands are rare. These parcels, being small are generally held and cultivated by hired labourers, but where there are raiyats the resumption and settlement do not affect the right of the cultivators who are protected¹.

Hill tracts of
Chittagong

The Hill tracts of Chittagong were removed from the operation of the general Regulations by Acts XXII of 1860 and IV (B C) of 1863. By the forest laws a large part of these tracts is "reserved forest". The chiefs of the hills paid originally a tribute known as *kápas* (cotton). Cultivation is still shifting. Some portions are permanently settled

¹ Haro Dass v. Trabeeram G. W. R. (AG X) p. 15

but a larger portion is *khás mahál*, in which settlers are being gradually introduced

The hill lands of Bhagalpur are mentioned in Regulation IX of 1825¹. This tract of country did not form part of any permanently settled estate and was inhabited by the aboriginal inhabitants, mostly Santhals. The Santhal Perganahs now include this tract. A part only of the Santhal Perganahs, the plain, was permanently settled, namely, the part lying by the river side near Rajmahal, but the hill tracts in the interior were not measured or surveyed, nor was any attempt made to bring the people under regular control until the year 1855 when Act XXXVII was passed. As early as 1780, the tract known as the *Daman-i-koh* was withdrawn from the general settlement. But there was practically no settlement of any kind, the Government having only a theoretical right. The *paharias* cultivated land by the system known as "jum" or shifting cultivation. By Acts XXXVII of 1855 and X of 1857, the hill lands of Bhagalpur and Birbhoom and the *Daman-i-koh* were removed from the operation of the Regulations and Acts then in force in the Bengal Presidency, as these were considered to be unsuitable to the Santhals. The permanently settled estates and *patni* taluqs were not touched by those Acts, and their incidents continued to be the same as before, but other portions of the district, thus formed, began to be dealt with as *khás mahál*. Regulation III of 1872 of the Bengal Code is now the Santhal Perganah Settlement Regulation².

Hill lands of
Bhagalpur

Santhal
Perganahs

In the Chotanagpur Division there are large Government estates, and the Palamow Subdivision is a *khás mahál* temporarily settled. The Government, as usual in all *khás maháls*, claims absolute proprietary right. Lands are never sold for arrears of revenue, and all sales

Chotanagpur
& Palamow.

¹ Reg IX of 1825, Sec 2, cl 3

² Reg III of 1872, Ram Charan Sing v Dhatuni Sing I L R, 18 Cal 146

or mortgages of land require the sanction of the Commissioner

✓
Bhutan
Doars.

The Bhutan Doars are parts of Jalpaiguri and were acquired in 1870. In that year the country was settled for ten years. The settlement was with the occupants called *jotedars*. The *jotes* are saleable for arrears of revenue.

Darjiling

Large tracts of land in Darjiling are dealt with as waste land. There are settlements with *jotedars* for terms varying from five to thirty years. The clearances, however, are few. The government has appropriated large tracts for cinchona cultivation. Some parts are held by *mahaldars* who are considered to be proprietors but they pay revenue. Some portions generally used for tea gardens are held in 'fee simple' or as revenue free holdings the right of the Government to rent having been sold.

Angul.

Angul was formerly a Tributary State. The Chief rebelled and was deposed in 1847 and the State was confiscated. The settlement is with the raiyats direct, though rent is realised through village headmen.

Khurda.

Khurda comprises nearly a half of the district of Puri. Until 1837 it was settled *mahaltwari* on rough estimates the persons admitted to engagement being called *Sarbarakars*. *Raiyatwari* settlement was made in 1837. The raiyats' holdings under the recent settlement for 15 years are generally small. Rent is still collected through *Sarbarakars*.

The Settlement
Regulations.

The settlement and adjustment of rent of these *khás maháls* were regulated by the procedure laid down in Regulation VII of 1822. That Regulation was passed for the Ceded and Conquered Provinces in Cuttack and the Perganah of Puttaspore but its operation was extended to the other provinces of the Bengal Presidency by Regulation IX of 1825. The main object of the Regulation was to revise, through the agency of the Collectors or Settlement Officers, the jumma payable to

Government after a full enquiry into and careful settlement of the rights and interests of all classes connected with the land"¹ The framers of the Regulation further declared that "a moderate assessment being equally conducive to the true interests of Government and to the well-being of its subjects, it is the wish and the intention of Government that in revising the existing settlement, the efforts of the revenue officers should chiefly be directed, not to any general or extensive enhancement of the jumma, but to the object of equalizing the public burthen"² This was a very laudable desire on the part of the State, but we know how the Regulation has worked The cases of Khurda, Midnapur, Chittagong and Poosa raiyats are not examples of moderation in the assertion of the absolute proprietary right of the sovereign

The Settlement Officer under the Regulation, who is Jumma-bandī either a Deputy Collector or a Sub-Deputy Collector, must give notices³ to the raiyats and all persons interested in the settlement, and then proceed to make the necessary enquiries and prepare *chittas* and *jumma-bandis* or rent-rolls Clause 1 of section ix declares the *jumma-bandī* to be final for all practical purposes, "until distinctly altered after full investigation in a regular suit" These *chittas* and *jumma-bandis* and the maps prepared by settlement officers are, however, not public documents within the meaning of section 74 of the Indian Evidence Act (I of 1872) They are records prepared by those officers in their executive capacity for the private purposes of the Government⁴ A contrary view was taken by Justice L S Jackson in *Taru Pattar v Avinas Chandra*

¹ Preamble to Reg VII of 1822

² Preamble to Reg VII of 1822

³ *Syed Shah v Durga*, 22 W R 455

⁴ *Junmaijoy v Dwarka Nath* I L R 5 Cal 287, *Ramchandra v Bangsidhari* I L R 9 Cal 741, *Akshoy v Shyama Charan* I L R 16 Cal 586, *Kanto Prashad v Jagat Chandra* I L R 23 Cal 335

Dutt He said that the "act of a Deputy Collector in making a settlement or enquiry under Regulation VII of 1822 is that of a public officer whether it be judicial or executive probably it partakes of both characters" ¹ But this view was not accepted as correct in the later cases. Garth C J went further and held that maps and plans prepared by the Collector for the purposes of settlement of rent would be no evidence ² under section 83 of the Act.

Binding effect
of settlement.

As regards the holder of a resumed invalid *lakhiraj* land within a *khás mahál* the rent assessed is binding until the assessment is set aside or abated ³. The raiyats, however, are not bound unless they assent, or the provisions of the law as to enhancement of rent are complied with ⁴. This is a necessary consequence of the Government being considered as a private proprietor in the districts to which the Beogal Tenancy Act applies.

Principles of
assessment.

In the year 1828 Regulation IV was passed for extending the powers exercised by Collectors under Regulation VII of 1822 and for control and revision by the Board of Revenue but the requirements of the law as laid down by these Regulations were never carried out satisfactorily. Considerable difficulty was felt in "ascertaining the amount of the *jumma* payable by raiyats in any *mahál* under settlement, on an ascertainment of the quantity and value of actual produce or on a comparison between the cost of production and value of produce" ⁵. The principle which was laid down in the previous Regulations and which was then understood to be the only

¹ *Taru v. Ajeet* 1 L. R. 4 Cal. 79.

² *Ramchandra v. Bangoldhari* 1 L. R. 9 Cal. 741.

³ *Haraprasad v. Syamprasad* 6 W. R. (A. N.) 107.

⁴ *The Nawab Nazim v. Ramlal* 6 W. R. (A. N.) 51; *D. Sil v. Rajkumar* 16 W. R. 153; *Enayetulla v. Nabakoomar* 20 W. R. 207; *Lodli v. Doorga monee* 21 W. R. 410; *Razuddin v. Mc. Alpin* 22 W. R. 540; *Akthoy v. Shyams Charan* 1 L. R. 16 Cal. 536.

⁵ Regulation IV of 1833, Sec. 2.

correct theory of rent and was generally accepted by European economists, was declared by this Regulation to be inapplicable, as it certainly was, to the Indian people¹ The principle of assessment based on customary rent, if I may use that expression, was adopted This basis of calculation was the rate of the rent actually paid by a large class of tenants, or the rent paid for land of similar description and under similar circumstances in places adjacent But the principle was not long adhered to, and the value and capabilities of land began again to be taken into consideration since 1837

The powers conferred by the Regulation Laws upon settlement officers were considered insufficient, and in the year 1878, an Act was passed by the Bengal Legislature "to define and limit the powers of settlement officers with respect to enhancement of rent"² This Act was, however, soon repealed, and in the following year, an Act³ was passed which is still the law in all the Regulation Provinces not touched upon by the Bengal Tenancy Act of 1885. I shall have to deal later on with the details of the system of enhancement prescribed by this Act and the corresponding Acts I may notice here one peculiarity as to the power of the settlement officers, namely, that the *jummabandis* prepared by them are final after publication, unless contested in civil suits instituted within four months,⁴ and unless it be proved by the raiyat that the enhancement was not in accordance with the Act⁵ This is a burden which it is always difficult for raiyats to discharge There is no presumption that the rent previously paid was fair and equitable, a presumption that all civilized legislation ought

Later Settlement Acts

¹ Reg IX of 1833, Sec 2

² Act III (B C) of 1878

³ Act VIII (B C) of 1879

⁴ Act VIII (B C) of 1879, Sec 15

⁵ Act VIII (B C) of 1879, Secs. 9 and 10.

Bengal Tenancy Act, sec. 19, cl. (a)

to recognise.¹ The Bengal Act of 1879 has now been repealed in the Regulation Provinces under the Lieutenant Governor of Bengal except Orissa.² The Local Government may with the sanction of the Governor General in Council extend, by notification in the official Gazette, the whole or any portion of the Bengal Tenancy Act to the Division of Orissa or any part thereof and chapter X of the Act has been extended by a notification. The Settlement Regulations are however, in force throughout the territory under the Lieutenant Governor except the Scheduled Districts as defined in Act XIV of 1874. Section 195 clause (a) of the Bengal Tenancy Act lays down that nothing in that "Act shall affect the powers and duties of Settlement Officers as defined by any law not expressly repealed by the Act. Regulation VII of 1822 and the Regulations modifying the same have not been expressly repealed by the Bengal Tenancy Act though for all practical purposes and to avoid complexity the rules of law and procedure laid down in chapter X of that Act about the record of rights and settlement of rent are adopted even in the *khás maháls*. In the Scheduled Districts there are special laws in force for land revenue administration. You will find them collected in chapter I of the Settlement Manual of the Board of Revenue.

Assessment final in some cases.

I ought here to add that by the terms of section 14 of Regulation VII of 1822 the assessment made by the Collector and confirmed by the Board of Revenue is final as to the amount except as to agricultural raiyats. The civil courts have no power to question it only the right to assess may be questioned.³

¹ Act VIII (B.C.) of 1869, Sec. 15; Act VIII of 1885 Sec. 27 Sec. 104, sub-sec. 31 *Issur v. Mills* W. R. Sp. Vol. 131; on review *ibid* 138; and see 1145 350, sc. W. R. Sp. Vol. 49; *Thakurani v. Biswas* 5 W. R. (A.C.) 29, sc. B. L. R. F. B. 202; *Umakanta v. Srikantha* 21 W. R. 108; *Mills v. Jandar* 1 W. R. 3.

² Act VIII of 1885 Sec. 1.

³ Reg. VII of 1822, Sec. XII; *Ram Chand v. Government* 6 C. L. R. 365; *Secretary v. Fakhimuddin* 1 L. R. 17 Cal. 590.

The Commissionership of Assam including Sylhet is, since the year 1874, under a separate administration. The whole forms a Scheduled District under Act XIV of 1874, and the Statute 33 Vic cap 3 applies to it. A part of the country, namely, the tract at the north foot of the hills in Goalpara, is regarded as permanently settled, but the rest is Government property. The Settlement Regulations of the Bengal Code, supplemented by rules framed by Government, are now in force in Assam.

By the operation of the Resumption Regulations, large quantities of land within the ambit of the permanently settled estates of Bengal and Behar came to be in the direct possession of Government. Many of these were, according to the practice and procedure that prevailed before 1871, permanently settled, but in that year certain general rules were framed by which the revenue officers were required to lease them out on temporary settlements. They are very seldom, if ever, kept under *khás* management. During the period of settlement, these resumed lands are necessarily subjected to the laws in force with respect to such estates, and revenue is settled under Regulations VII of 1822, IX of 1825 and IX of 1833 and Act VIII (B C) of 1879. I shall revert to this subject later on, when I deal with the Resumption Regulations.

It not unfrequently happens that there are no purchasers of estates put up to for arrears of revenue. If the gross assets of an estate are reduced by diluvion, or depopulation on account of epidemics, famine or inundations in successive years, so that there may be no purchasers, the Collector is authorised to purchase on behalf of Government. In such a case the acquisition is subject to the provisions of Act XI of 1859.¹ Instances of escheated or forfeited estates are not rare. The Khurda estates in the

¹ Act XI of 1859, Sec 58

district of Puri, Angul and Banks have come into the possession of Government by escheat. A few estates in Behar were made khás after the Indian mutiny, but most of them were re-settled permanently.

Island
churs.

Island churs are under Regulation XI of 1825¹, the property of Government.² Some of these have been temporarily settled. Alluvial accretions to an estate by the recession of the sea or of tidal navigable rivers are not the property of the State. They belong to the holder of the lands³ to which the newly formed lands have gradually accreted. But the Government has, under Act IX of 1847 the right to assess such accreted lands with additional revenue if it be found that such lands are not reformation in the site of disjunct parts of settled estates and if the holders of the estates have continued to pay revenue for the same without abatement.⁴ Several estates have been formed on account of the separate assessment of such accreted lands. They are seldom if ever kept under khás management, as under the law the Government is bound to allow the holder of the adjoining estate to have the settlement. It is only in cases where the holder of the estate declines to accept the assessment that the land becomes khás⁵ but even then the proprietor is entitled to malikana.

Rules of as-
sessment of
revenue

Revenue is assessed on the principles laid down in Regulation VII of 1822 and the Regulations and Acts modifying it and the proprietor is entitled to have settlement at a jumma calculated on the gross assets less collection charges and malikana. Such accreted lands

Reg. XI of 1825 Sec. 4 cl. 3.

¹ Khilai v. Collector W. R. (1864) 73.

Reg. XI of 1825, Sec. 4 cl. 1 Pothl v. Kirti 1 W. R. 1241 Oudh v. Ringoried 3 N. W. P. Rep. 7051 Fazl v. Imilar 4 N. W. P. 1521 Lopez v. Madden 5 D. L. R. 521; 13 M. L. J. 457 14 W. R. P. C. 11

Act IX of 1847 Sec. 7

Secretary v. Fahamidsaulsa L. R. 17 1 A. 40 Sc. 1 L. R. 17 Cal. 590

Reg. VIII of 1822 Sec. 43

are numbered in the revenue roll of the District as separate estates ¹

The policy of Government was to settle lands permanently after assessment under the Settlement Regulations In fact, those Regulations were framed in pursuance of that policy Since 1861, the policy of selling estates outright after settlement was also adopted, a policy which may well be questioned from a financial point of view In 1871, a change was introduced, since when temporary settlements only have been allowed But in 1875, the Government ruled that there should be *khás* management whenever practicable, if the extent of land and cultivation are sufficient to support *tehsildari* (collection) establishment

Policy of settlement.

The settlement of land-revenue in temporarily settled estates and *khás maháls* takes place periodically The Government is a *landlord* within the meaning of the word as used in the Bengal Tenancy Act, and though the amount payable directly to Government in the *khás maháls* is *rent*, the paramount title of the State carrying with it the right to receive revenue and the proprietary right to receive rent uniting in the Government, the proprietary interest merges in the paramount title, and rent in such cases is called revenue The right, however, to settle the revenue is regulated, in the districts to which the Bengal Tenancy Act applies, by the procedure laid down in chapter X of the Act and the rules framed by the Local Government, and no fresh settlement of revenue can be undertaken until the lapse of fifteen years, though there may be decennial surveys under Act IX of 1847 In the temporarily settled estates the same rules are applicable The Settlement Officer ascertains the amount justly payable or is actually paid by the raiyats which is ordinarily called *rent*, and after such assessment, deduction is made for collection charges

Rules of settlement in temporarily settled estates

¹ A& XXXI of 1858

and *malikana* where this is payable and temporary settlement is then made with the person who becomes the proprietor or landlord for the period during which the settlement may last

Orissa.

Settlement operations are now going on in the province of Orissa which contains the largest number of temporarily settled estates. Although Regulations VII of 1822 IX of 1825 and IX of 1833 and Act VIII (B C) of 1879 apply with full force in this province, the procedure for fresh settlement adopted is that laid down by chapter X of the Bengal Tenancy Act and the rules framed under section 189 of the Act. I propose to deal with this province later on

Sunderbunds

In the beginning of this century the large tract of deltaic land known as the Sunderbunds and covered with dense forest was not included within the permanently settled area of the districts of Twenty four Perganahs and Jessore. But squatting and encroachment by holders of adjacent permanently settled estates were common even in those early days. The zemindars of Taki in the Twenty four Perganahs were the most prominent in this practice of encroachment. In the year 1816 the Government thought it necessary to appoint a special officer called the Commissioner of the Sunderbunds for the fiscal management of this tract.¹ Section 3 of Regulation II of 1819 wellknown as the Resumption Regulation expressly referred to this forest tract² and in 1825 the settlement rules laid down in Regulation VII of 1822 were made applicable to it.³ Up to this time however the attention of Government was directed only to the cleared and occupied portions which were *encroachments* and which were technically *taufir*. But in 1838 rules were laid down for the determination of the boundaries of the tract which was formally declared⁴ to be the property of the State the same not having been

R & L of 1816.
Reg IX of 1825 Sec 2 1 3

Reg II of 1819 Sec 3 cl 3
Reg IX of 1825 Sec 13 cl 3

alienated or assigned to zemindars" The Governor-General in Council was declared competent to "make grants, assignments and leases of any part of it"¹ The claims of persons in possession of cultivated lands in the neighbourhood of settled estates were left to be determined under the rules laid down in Reg II of 1819 Any objection to the line of delimitation was to be made within three months² from the date of the Commissioner's proceeding fixing the same, and on no account later on This sea-board of the delta of the Ganges was defined by the boundary line laid down in 1829 by Mr W Dampier, the then Commissioner of the Sunderbuns Captain Hodge's map is a well-known map of delimitation The cultivated portions within the line were formed into permanently settled estates as "patit-abadi" taluqs

Fungalburi leases or leases for reclamation and cultivation of waste lands in the Sunderbuns began to be granted from time to time until the year 1845, when a large number of grants were made, but no definite rules for grants of waste lands were framed until the year 1853. The Sunderbun grants made under these rules were for 99 years with conditions for progressive enhancement of revenue and compulsory clearance There was liability to forfeiture for non-clearance After the lapse of 99 years there is to be fresh settlement of revenue Most of the important lots, thus granted, have now been cleared, and many of the present holders of the grants are rich land-holders The rules of 1853 were virtually superseded by those laid down in accordance with Lord Canning's Minute of 1861,—the *sale-rules* known as the "fee-simple" rules But they proved inoperative, and a set of revised lease-rules was adopted in 1879 The *rent-free*

Settlement
rules of the
Sunder-
buns

¹ Regulation III of 1828, Sec 13, cl 1

² *Raja Barada v Commissioner* 12 M I A 225, 2 B L R, P C, 33, 11 W R, P C, 14.

period is, under the new rules, two years, and there is only one *clearance condition viz*, that one eighth of the entire grant should be rendered fit for cultivation at the end of the fifth year, the usual term of lease being forty years with condition of resettlement. The tenures are heritable and transferable.

Sunderban
grants are
temporarily
settled es-
tates.

The lands covered by the grants made under the old or the new rules are temporarily settled estates, and they come within the purview of the Regulations and Acts dealing with them. They are saleable for arrears of revenue under Act XI of 1859 and Bengal Act VII of 1868.

✓
Forests.

In the year 1865 the Government of India gave its special attention to the management and preservation of Government forests. The rules in force at the time were with modifications incorporated in Act VII of that year. The importance of the preservation of forests was insisted on by high authorities in India and in 1878 an Act¹ was passed to amend the law relating to them. Forest settlement officers were appointed, as also forest officers for the preservation and protection of forests and provision was also made for income from forest produce. The settlement officers were vested with the powers of a Collector under the Land Acquisition Act of 1870. Penalties were laid down for infringement of the provisions of the Act and the subsidiary rules that might be framed thereunder.

Rules for
the protec-
tion of
forests.

These important provisions for the protection of forests required the establishment of a special department of officers. The income of Government may be classed mainly under three heads *viz*, sale of timber, the catchlog of wild animals especially elephants and produce of trees such as rubber, caoutchouc, gum and cocoons. The working of the Act has occasionally caused hardship upon private owners of forest lands. Convictions under the provisions of the Forest Act are

¹ Act VII of 1883

not unfrequent, and you will find in the Reports a number of cases on the subject ¹

A small quantity of land is held by Government as *khás* on acquisition either from settlement holders or holders of revenue-free lands I leave out of consideration such lands as are still held by Government on payment of rent to zemindars Acquisition of land for public purposes was not common in the beginning of the British rule The only lands then apparently used were for military purposes and for manufacture of salt The monopoly of salt-manufacture began since the year 1780 Large quantities of land on the sea-coast fit for the purpose were taken possession of by the Salt Agents of Government in the Twenty-four Perganahs, Jessore, Khulna, Chittagong, Midnapore and Balasore, for which, whenever the lands were included within the ambit of permanently settled estates, Government paid *khalarí* rent In 1824, Regulation I was passed for acquisition of lands for public purposes and the adjustment of the claims of zemindars for salt lands This Regulation continued to be in force until the year 1857, when Act VI was passed, repealing it In the mean time, two Acts had been passed in 1850—Act I, extending the first seven sections of the Regulation to the town of Calcutta, and Act XLII, declaring Railway to be public-work within the meaning of the Regulation Act X of 1870 repealed the Act of 1857, but the Act now in force is Act I of 1894 Under these Acts, acquisitions made by Government are free of all incumbrances

Acquisition
of land by
Government

Section 10 and the subsequent sections of Regulation I of 1824 deal with the right of Government as regards *jalpai* or salt lands The Government gave up the monopoly of salt-manufacture in 1863, and such portions of the lands occupied for salt purposes as

Jalpai land

¹ Deputy Commissioner v Notheram 21 W R 435, Queen Empress v Ramji Sajaba Rao 1 L R 10 Bom 124.

were within the area of permanently settled estates, were assessed and settled as *khás maháls*. Disputes arose between Government and some of the zemindars in the district of Midnapur the latter claiming the right to hold the lands. One of these cases was contested but the Judicial Committee of the Privy Council decided in favour of Government, holding that Regulation I of 1824 gave Government the absolute right to these lands¹.

Road-Cess.

Road cess under Act VIII (B. C.) of 1880 is payable by Government for the *khás maháls* in the same way as by the owner of private estates. Section 7 of the Act provides for payment of road-cess by the local Government the sum not exceeding what would be payable by a private person. The public works cess which is a fund originally levied for famine purposes but now appropriated to imperial purposes, does not seem to be payable by the local Government.

Public Demands Recovery Act.

The Government dues in *khás maháls* are generally realised by the certificate procedure laid down in the Act known as the Public Demands Recovery Act 1880². The Act has not been found to work satisfactorily and it is expected that a new Act will be passed by the local legislature early next year. The Act now in force gives the Collector, or a Deputy Collector duly empowered to that behalf power to file a certificate³ in his office, and from the date of the service of notice thereof⁴ it has the effect of an attachment on the properties belonging to the debtors⁵. After the expiry of thirty days and if no objection be made or if an objection be made and the same be disallowed⁶ the certificate has the force of a decree of the Civil Court and the Collector has the right to enforce the same.

Secretary v. Anandmoyee I. L. R., 8 Cal. 95 sc. 8 Cowell's 1ed.
 App 172.
 Act VII (B. C.) of 1880. Act VII (B. C.) of 1880, Sec. 5
 Act VII (B. C.) of 1880, Sec. 10. Act VII (B. C.) of 1880, Sec. 11
 Act VII (B. C.) of 1880, Sec. 13 19

and levy the amount as a civil court. The proceedings taken are generally loose, and the various steps for bringing the debtors' properties to sale are left without proper supervision to irresponsible agents. Instances of gross violations of private rights by sales under the Act are very frequent. I have been informed that Government dues are not also fully realised by the adoption of the Certificate Procedure. I hope the amending Act will be so framed that not only the interest of Government will be duly protected, but ample protection will be afforded to a poor but a large class of subjects who are now frequently made to suffer from the negligence and occasional stupidity of the subordinates in District Collectorates. It very frequently happens that the poor debtors, who cannot afford to have revenue-agents at the Collectorates to watch their interests, know nothing of certificates and sales of their properties under the Public Demands Recovery Act, until the fortunate or unfortunate purchasers, as the case may be, come to take actual possession. Litigations follow to the ruin no less of the purchasers than that of the debtors. The cases are taken through the various stages of the tardy and cumbrous procedure of civil courts. The extension of the provisions of the Cess Act¹ for direct realisation of Government dues from the poor *lakhanaj*-holders has been a source of unmitigated mischief in several districts. The amounts realisable are small, but the means adopted for their recovery are expensive and occasionally bring down ruin.²

¹ Act IX (B C) of 1880, Sec 70

² Since these lectures were delivered the Bengal Legislature has passed Act I of 1895 which has materially altered the Act of 1880. One important feature of the Act is the extension of the provisions of section 310 A of the Code of Civil Procedure to certificate-sales.

LECTURE III

REVENUE-FREE LANDS

Policy of the
East India
Company as
to *lakhtaj*
lands.

When the East India Company took formal charge of the finances of the Bengal Provinces as Diwan of the Great Moghul, it was found that large quantities of land were in the possession of private individuals who paid no revenue for them. Starting, as they did with the theory of the king's or the conqueror's absolute dominion over the soil, the Company was not bound to recognise any right that detracted from the right to take possession of or assess with revenue every inch of land in the country. But principles of humanity prevailed and the Government continued to the "grantees or their heirs such of those grants as were hereditary and were made before the date of the Company's accession to the Diwani, provided the grantees or their heirs had obtained possession previous to that date."¹ To use another utterance of the framers of the Regulation Code of 1793, "the lenity of the East India Company induced them to adopt it as a principle, that grants made previous to the date of the Diwani should be held valid"² though there were certain necessary restrictions.

Origin and
history of re-
venue-free
grants.

The origin and history of these grants made by the previous ruling powers in India is a subject of some interest. The Hindu kings, as we have seen, were entitled to a share of the produce of the land for the protection they afforded to life, liberty and property. But the

¹ Preamble to Regulation XXXVII of 1793.

² Preamble to Regulation XIX of 1793.

great law-giver of ancient India said—"A king, even though dying with want, must not receive any tax from a Brahmin learned in the Vedas;"¹ and he added,—“By that religious duty, which such a Brahmin performs each day under the full protection of the sovereign, the life, wealth and dominion of his protector shall be greatly increased”² Our great poet Kalidasa in his *Abhijnana-Sakuntalam* was referring to the utterances of Manu and other sages and the universal practice of Hindu kings, in the following conversation between Dushmanta and Madhavya.—

“*Madhavya*—Say, you have come for the sixth part of the grain which they owe you for tribute

“*King*. No, no, foolish man, these hermits pay me a very different kind of tribute which I value more than heaps of gold or jewels, observe—

The tribute which my other subjects bring,
Must moulder into dust, but holy men
Present me with a portion of the fruits
Of penitential service and prayer,
A precious and unperishable gift.”³

(Dr. M. William's Translation).

1 मित्र्यमाणोप्याददीत न राजा श्रीवियात् करम् ।

Manu, Chap VII, v. 133

2 संरक्ष्यमाणी राज्ञा यः कुरुतेधर्ममन्वहं ।

तेनायुर्वर्द्धते राज्ञो द्रविण राष्ट्रमेव च ॥

Manu, Chap VII. v 136

3 विदूषक । की अवरी अवदीसी तुम्हाणं राभाणं णीवारच्छदभाअ अम्हाणं चपहरन्तु ति ।

राजा । मूर्ख, अन्धीभागधेयएतेषा रक्षणे निपतति योरबराशीनपि विद्यायाभिनन्दः । पश्य

यदुत्तिष्ठति वर्षेभ्यो नृपानां क्षयि तत्फलम् ।

तपःषड्भागमक्षयं ददत्यारण्यका हि नः ॥

Abhijnana-Sakuntalam, Act II.

Vishnu

Vishnu has also said — "A sixth part both of the virtuous deeds and of the iniquitous acts committed by his subjects goes to the king" ¹ This exemption from tax of a class of men on the principles thus enunciated is an instance of, what lawyers call, a *legal fiction*. The king is supposed to be entitled to a sixth of the produce from all persons in occupation of land, and the exemption of a class of pious men is ascribed to a fictitious payment — a payment which according to Hindu notions not only counterbalanced but outweighed by far, in both temporal and spiritual points of view, any benefit that might be conferred by actual payment in kind or specie.

Vrihaspati.

This practice of allowing pious Brahmins, learned in the Vedas to hold land revenue free was soon extended to Brahmins, who had a large number of disciples to teach in other branches of learning and also to other religious and charitable objects. By the time that Vrihaspati composed his *sūtras*, who according to European authorities, wrote long after the days of Manu, the legal fiction was lost sight of, and the sage distinctly speaks of gifts of lands to pious Brahmins learned in the Vedas without reference to it. The extension of the territories of Hindu Kings and the subjugation of aboriginal tribes necessitated the immigration and settlement of learned Brahmins in the newly acquired countries. Vrihaspati says — The king shall invite Brahmins versed in the Vedas and devoted to the maintenance of the sacred fire and settle them in the newly acquired land and make provisions for them ² Yajñavalkya also says — "The king shall provide a place for and

Yajñavalkya.

¹ राजा च प्रजाभ्यः सप्ततृत्तयं बह्विधमाहू

Vishnu Smṛiti III 21.

² बह्विद्याविप्रैर्ब्रह्मन् श्रीविद्यामधिधीयन् ।

आहूय ध्यायन् नमः शिवाय इति प्रब्रूयन् ।

Vrihaspati quoted in Vṛhaspatirodya Jibavandya Vidyāgaras Edition
p. 413.

settle Brahmins, versed in the three Vedas, in the town, with provisions for their maintenance, charging them to perform the duties of their callings"¹ There are various pious and religious acts which these Brahmins were expected to perform, and the texts of sages are many that require them to perform duties which, we would say, are necessary even for sanitary and agricultural purposes

The grants made by Hindu kings were expressly revenue-free The deeds which the kings were directed to execute as evidence of such grants were called sāsana or rajsāsana, and were required to be, if possible, on copper-plates Vrihaspati² states in detail what these copper-plate grants should contain Grantees were to hold in perpetuity, or to use the rhetorical language of the sage, "as long as the sun and the moon shine on the horizon." All future kings are enjoined to respect these grants Many copper-plate grants, almost in the very language of Vrihaspati's texts with immaterial modifications, have been recently discovered For the purposes of the present lecture, I would draw your attention to only a few specimens covering lands in the Lower Provinces of Bengal The tide of Aryan migration towards the East was rather slow Bengal attained importance as an Aryan kingdom during the reign of the Pal Rajas and their successors, the well known kings of the Sen family It is said that the celebrated Ballal Sen³ and his worthy descendant Lakshman Sen⁴

¹ राजा कृत्वा पुरेस्थान ब्राह्मणं न्यस्य तत्र तु ।

त्रैविद्यं हस्तिमदब्रूयात् स्वधर्मःपाल्यतामिति ॥

Yajnavalkya quoted in Viramitrodaya, p 423

² "चन्द्रार्कसमकालीनं पुत्रपौत्रान्वयानुगम् ।

अनाच्छेद्यं मनाद्द्वयं सर्वभागविवर्जितम् ॥"

Vrihaspati quoted in Viramitrodaya, 192

³ 1066 to 1107 A D

⁴ 1107 to 1129 A D

made a large number of grants in favour of learned Brahmins and even of Kayasthas, who had been invited by Adisur¹ from the North Western Provinces to take up permanent abode in the rich and alluvial lands of the Gangetic delta. Several ancient families in these provinces claim their descent from these settlers, whom the policy or liberality of the Sen Rajas drew down from the earlier habitations of our Aryan fathers, and they still hold lands under grants made eight or nine centuries ago. The copper plates that have been discovered are legal documents, complete in every respect, executed apparently for pious and religious purposes. Vighraha Pal was one of the Pal Rajas, and the Amgachi plate² is an instance of alienation of revenue made by him. A copper plate was discovered near the Sunderbuns some years ago, executed by the celebrated Raja Lakshman Sen³. Another copper plate was discovered in 1874 in the Tarpanidighi in Dinajpur, also executed by Lakshman Sen by which the grantor granted a share in the land of the village of Bilahisti.⁴ A similar plate executed by Keshub Sen son of Lakshman Sen, has also been found in Perganah Idilpur in Bakergunj.⁵ Copper plates have also been discovered, similar in language and import, executed by the Hindu Kings of Behar—the Magadha and the Mithila Kings. Grants of lands revenue free for the performance and continuance of the worship of Hindu Gods were also numerous. They are generally in the names of the priests the *sebayets*.

Grants to Brahmins are known in Bengal by the generic name, *bramhattar*, and in Behar by the name *brit* (ब्रित्) and lands dedicated to the gods by the name

¹ 986 to 1006 A.D.

Asiatic Researches, Vol IV. p. 440.

A discourse on the Bengali Language and Literature by Pandit Ramgobind Chatterjee. Part II p. 371.

Journal of the Asiatic Society Bengal 1875, p. 1.

⁵ Journal of the Asiatic Society Bengal, Vol VII p. 42.

devattar or bissenprit. These grants are known in different parts of the country and, according to the peculiarities of the terms and conditions, under various names, some of which require specification Mahatran are revenue-free grants to persons or families other than Brahmins. These latter are also numerous in Bengal proper, especially in the Presidency Districts.

As I have already said, the Afgan conquest of Bengal was never complete. Many of the ancient Hindu royal families, which, according to the practice of olden days, had only become tributaries or subordinates of the Sen family, as the imperial power, continued to hold on, after the conquest, sometimes yielding only nominal allegiance to the Musalman viceroys or kings, and not seldom defying them. The grantees of revenue-free lands in these independent or semi-independent principalities remained in quiet possession, and we have reason to believe that fresh grants continued to be made even in the days of Afgan rule. The Great Moghul could not make much impression in Bengal. The same causes, which had worked in the days of India's freedom from foreign yoke, impelled, with equal force, the class of men latterly called *zemindars*, to occasionally alienate the state share of the produce of lands in favour of Gods and Brahmins and the gentry in these provinces. Thus large quantities of land in the Bengal Provinces, especially in Bengal proper, came to be *lakhiraj* i e, free from *khiraj* or revenue, and the East India Company, when they accepted the Diwani from the great Moghul, had many difficult problems to solve with reference to them.

Practice in
later days

The doctrines of the Mahomedan faith, as much as the Hindu, favoured grants or *appropriations* for religious and charitable purposes. "Superstitious uses" is an expression that could be applied equally to the practices of almost all nations and all creeds. Religious fervour existed in the Afgan and the Moghul Kings

Wuqfs.

and Emperors in a high degree. Even that extraordinary prince Akbar Shah with his broad views, which some historians have characterised as irreligious, was not slow in making gifts of lands to men of great merit, and for pious and charitable purposes. Instances of grants by other Mahomedan potentates to Hindus were not also uncommon.

Jajirs.

Grants to military officers and servants of the state were called *jajirs* in the days of the Mahomedan government. In the language of Regulation XXXVII of 1793¹ '*Jajirs* are to be considered as life tenures only and with all other life tenures are to expire with the life of the grantee unless otherwise expressed in the grant.' They have often been said to be life grants. Originally of a feudal character, but not hereditary, they were granted on condition of service. In India, however, offices frequently descend from father to son and they were renewed very frequently in favour of the sons of previous holders. But the terms of *jajir* grants were not uniform. They were occasionally given to be held as hereditary and alienable grants. A *jajir* must be taken *prima facie* to be an estate for life only although it might be on such terms and conditions as to make it hereditary². Under British administration many *jajirs* have become hereditary and alienable³. *Jajirs* are said to be of two kinds—conditional and unconditional. Conditional *jajirs* could be held as long as the grantee continued to perform the service for which the revenue was alienated in his favour⁴. Unconditional *jajirs* are personal grants

Reg. XXXVII of 1793, Sec. 13.

Gulabdas v. Collector L. R. 61 A 54 at 1 L. R. 3 Bom. 186.

Collector v. Martindell 2 N. W. P. Sel. Rep. 189; Bethal v. Lakshmi 2 N. W. P. Rep. Civ. App. 248. Nilmoni v. Dakranath L. R. 9 A 104. at 1 L. R. 9 Cal. 187; Dosi Dal v. Iswar L. R. 9 Bom. 361.

Field's Introduction to the Regulations p. 61; Tagore Lectures 1874-75 p. 201. Nilmoncy v. Government 18 W. R. 321.

for life.¹ In Bengal there are a few *jaigirs*, but in Behar there are a good many created by the emperor Shah Alum, and they have since been treated as estates of inheritance.² It should be remembered that *jaigirs* are not grants of lands, but they merely indicate interception of the *khiraj*. They are not strictly *lakhiraj*.

Milk or *Milik* was, in Mahomedan times, a grant of land, and not merely interception of the revenue. The grantor was usually in occupation of the land. Such grants are very common in the North-Western Provinces, they are rather rare in Bengal and are generally known by other names. They are hereditary and transferable. Milk or Milik

Regulation XXXVII of 1793 refers to *altamgha*, *ayma* and *madadmash* grants as hereditary and transferable by gift, sale or otherwise.³ Hereditary *altamghas* were royal grants under the Emperor's red seal, and referred to revenue of land under cultivation. They are now found chiefly in Behar. Altamgha

Aymas were grants made to *Imams* by the sovereign. In Bengal they are of two descriptions,—revenue-free (*lakhiraj*) and revenue-paying (*malgoosary*). We shall deal with revenue-paying *aymas* later on, as they are now regarded as revenue-paying estates. Revenue-free *aymas* are in their incidents the same as *milik* and *madadmash*. Aymas.

Madadmash grants are not uncommon in Bengal. They were made for religious purposes and, as such, are inalienable.⁴ The grants were in perpetuity. The distinction between *madadmash* and grants of a similar nature known by other names is very little, except as to origin and use of the lands, but whatever the origin, the Regulation of 1793 has done away with all distinctions. Madadmash.

¹ Bukronath v Government I. L. R. 5 Cal 389

² Field's Introduction to the Regulations p. 68

³ Reg. XXXVII of 1793, Sec. 15

⁴ Jewun Doss v Shah Kubeeroodeen 2 M. I. A. 390

Seyurghal.

Seyurghal grants are not mentioned in the Regulation, but they are found in Bengal. These were grants of lands to learned men and scholars, to Madrasas or colleges or to Fakirs or saints who withdrew themselves from worldly affairs. They were originally for life, but when grants were made to colleges they were necessarily perpetual. These grants like malgoosary aymas were not free from revenue and one fourth of the revenue was payable as the share of the state.

Nasarat.

Nasarat lands are held for performance of services and for other religious purposes at masjids. They were granted for public purposes for the benefit of the Mahomedan community. Being public endowments, they are inalienable in their nature like lands granted for other charitable and religious purposes. The succession is regulated according to the directions in the grants, or the custom and usage prevalent in the locality.

Revenue-free grants made between 1763 and 1790.

It does not appear that during the period of the Mahomedan government of the Bengal provinces, any serious attempt was ever made to resume revenue free or rent free lands though, as a matter of fact, they were then almost as abundant as they were in the year 1793. After the assumption of the Diwani in 1763, some fresh alienations were undoubtedly made. The distressful visitation of the famine and the consequent depopulation the necessary solicitation of the zemindars to have men of the higher classes as well as actual cultivators to occupy and cultivate the land and prevent its reverting into the state of primeval forest under the tropical sun and rain and not infrequently the fraudulent desire on the part of some zemindars to take advantage of the revolution and the disorder, attending the administration by a set of handful men who were from their ignorance of the people and their language, merely tools in the hands of crafty subordinates had induced alienations of lands as lakhs without the authority of Government. The superior officers in the

Company's service had reason to believe that land to a considerable extent, held under exemption from payment of Government revenue, existed in the Bengal provinces, some under proper authority, but a good deal under fraudulent and forged grants. The Directors of the Company wanted money. Increase of revenue was urgently needed, and as a means of replenishing the exhausted coffer, plans were early adopted to check further alienations, and for ascertaining the real merits of the alienations already made. The first attempt was made by Warren Hastings in 1782, and Regulations were passed for the purpose. These were modified in the following year. These rules, again, were, with certain modifications, reproduced in Regulations XIX and XXXVII. But the plans thus made for the increase of revenue were ineffectual, and Regulation II of 1819 was passed to carry out effectively the object of the Resumption Regulations of 1793. The Regulation of 1819 is well known in Bengal by the vernacular name, *Doem Quanoon*.¹ Other Regulations were subsequently passed in furtherance of the same object, and Regulations IX and XIV of 1825 and III of 1828 are the most important of them. This last Regulation empowered the appointment of special Commissioners, known in Bengal as *Khás Commissioners*, for the trial of the large number of resumption cases which were filed after the passing of Regulation II of 1819. The Government succeeded in resuming some lands, and the holders of permanently settled estates derived additional income by having occasional recourse to the resumption laws, but, more frequently, to forcible ouster.

The study of the resumption laws and the numerous rulings interpreting them is now of little practical utility. The legal machinery introduced by these laws, with all its crushing power, has done only a small

Study of resumption laws now of little practical utility

¹ *Ante* p. 40

portion of the work, it was intended and expected to achieve, but the stronger hand of time, with its rules of prescription and limitation, has now almost entirely quieted titles, however disputable at one time. Now and then, a purchaser under a sale for arrears of revenue or rent, obtaining land free of incumbrances, attempts to disturb long possession, now and then, the combination of raiyats sets up false and fraudulent *lakhiraj* titles to defeat or delay the realisation of rent by new or oppressive landlords and, occasionally, the forcible ouster of *lakhiraj* holders compels them to seek remedy at law but these cases are growing rarer with the lapse of time. The cases that are now instituted are decided more on general principles of prescription and limitation than on the technical rules laid down in the Bengal Regulations. But no treatise on the legal incidents of land in Bengal should be without a few words on the once important laws about resumption. Laws, which cost immense sums in litigation, and procedures, which brought forward immense learning and legal disquisitions, are matters of study and curiosity to legal antiquarians.

Scope of the
Resumption
Regulations.

Broadly speaking the Resumption Regulations referred not only to lands within the ambit of permanently settled estates but also to lands outside the same. The latter class of lands was not dealt with by the earlier Regulations. Regulations II of 1819 I of 1825, XIV of 1825 III of 1828 and I of 1833¹ deal with lands not included within the limits of any *perganah*, *mouzah* or other division of estates, already settled. They were mostly waste or uncultivated lands at the time of the permanent settlement.² The proceedings however, about them were also called resumption proceedings.

¹ Reg II of 1819, Sec. 3; Reg I of 1825 Sec. 2; Reg XIV of 1825, Sec. 6; Reg III of 1828 Sec. 13

² *Ain* p. 41

At the time of the Decennial Settlement, large quantities of unascertained land had been left unassessed, though they were within the settled area. The Government, at the time, classed them under two heads, the one claimed to be held under *Badshahi* or royal grants, the other *non-Badshahi*. The rules passed on the 23rd April 1788 had dealt with *Badshahi* grants, and those passed on the 1st December 1790, with the other class. In the Code of 1793, passed on the 1st May of that year, the distinction between the two classes of grants was preserved. In the Proclamation announcing the Permanent Settlement, the Governor-General in Council retained the power to "impose such assessment, as he might deem equitable, on all lands at present alienated and paying no public revenue which had been or might be proved to be held under illegal or invalid titles." The Proclamation then went on to say—"the assessment so imposed will belong to Government, and no proprietor of land will be entitled to any part of it"¹. This part of the Proclamation applied to both classes of lands claimed as revenue-free.² Section 36 of Regulation VIII of 1793 also referred equally to both the classes.³

Grants, *Badshahi* and *non-Badshahi*

Now, what are these *Badshahi* grants? It would seem from the expressions, *Badshahi*, *Altamgha*, etc., used in Regulation XXXVII of 1793, that the framers intended to denote by the word *Badshahi*, all sorts of grants made or alleged to have been made by the Mahomedan Emperors only. The corresponding Regulation XIX of 1793 refers in words to "numerous grants not only made by the zemindars but by officers of Government appointed to the temporary superintendence

Badshahi grants.

¹ Reg I of 1793. Sec 8, cl 3

² Preamble to Regs XIX and XXXVII of 1793

³ "The assessment is also to be fixed exclusive and independent of all existing lakhiraj lands, whether exempted from the Khiraj (or public revenue) with or without due authority" Reg VIII of 1793, Sec. 36.

of the collection of revenue"¹ The Regulation about *Badshahi* grants does not in words refer to grants made by the previous native governments. But it was not necessary to say anything about grants made by *Hindo* kings. Forged documents purporting to be under the authority of native governments might be produced, but Government either omitted, or did not care, to legislate about them. Regulation XXXVII² contemplated cases more of expired grants than grants which might be held to be forged, altered or ante-dated. All grants of lands, whether *Badshahi* or not, made by whatever authority for 'holding land exempt from the payment of any revenue previous to the 12th August 1765 were declared to be valid provided the grantee or his heirs had *bona fide* obtained possession previous to that date³ and provided that the grants were made in perpetuity.

by
Burden of
proof.

The burden of proving the genuineness and validity of these grants was on those who set them up, the presumption being that the Government was entitled to assess every inch of land⁴. The burden was rather heavy and it became heavier as years elapsed. Regulation XIV of 1825, therefore, enacted that uninterrupted possession exempt from assessment from the date of the Diwani in Bengal Behar and Orissa, and from the 14th October 1791 in Cuttack, would be sufficient to prove valid *lakhtiraj* title⁵ but proof of possession and the hereditary nature of the grant (in the case of persons not the original grantees) must be given by the claimant.

¹ Preamble to Reg. XIX of 1793.

² Reg. XXXVII of 1793 Sec. 12.

³ Reg. XIX of 1793 Sec. 2 and Reg. XXXIII of 1793 Sec. 2.

⁴ Reg. XIV of 1825, Sec. 3, cl. 3; *Maharajah v. Government* 4 M. I. A. 466; *Omerah v. Dakhla* Sp. W. R. 95; *Radha Krishna v. Radha Munger* 2 Ser. 366; *Ellis v. Thirumam* 1 W. R. 164; *Koylashbasklay v. Gocoolmool* 1 L. R. 8 Cal. 370.

⁵ Sec. 3, cl. 2, 3; *Maharaja v. Government* 4 M. I. A. 466.

No royal grants could, in the nature of things, be made after the 12th August 1765, and no grantee could rely upon any imperial firman made after that date. The rules of 1793, therefore, held that, on the expiry of life-grants, and on any propounded document of revenue-free title being found to be forged, the lands covered by them would revert to the State, whatever the quantity might be, and on resumption, expiry or escheat, they would be assessed and settled in perpetuity, agreeably to the rules of settlement contained in Regulation VIII of 1793.¹ The zemindars, within the ambit of whose estates the lands lay, were declared entitled to settlement, as if the lands were separate revenue-paying estates.² Any questions as to the nature of the original grants, whether for life or in perpetuity, were to be decided by the terms of the grants, or if they were not found, according to the ancient usages of the country.³

Regulation
XXXVII of
1793

The more important class of grants, in a lawyer's point of view, is the *non-Badshahi*. As I have already said, proprietors of settled estates had no title to possession of lands covered by invalid or expired *Badshahi* grants though lying within the ambit of their estates and whatever the quantity might be. But the case was different with the other class. Regulation XIX of 1793 laid down different rules for resumption and assessment of lands according to quantities and dates of grant. They were classified as,—(1) exceeding one hundred bighas, (2) below one hundred and exceeding ten bighas, and (3) not exceeding ten bighas.

Classification
of *non-Bad-*
shahi grants
as to quantity
of land

Again, for the sake of convenience, I may classify them with reference to time under the following heads.—(1) from 12th August 1765, the date of the Diwani, to the 12th April 1771, the beginning of the Bengal

Classification
as to dates of
grants

¹ Reg XXXVII of 1793, Sec. 6

² *Dabee v Joy* 12 W R 361.

³ Reg XXXVII Sec. 2, cl 3

year 1178 or the 26th September 1771, the hegioning of the Fuslee and Wahaty year 1179 (2) from these latter dates i.e. the 12th April 1771 or the 26th September 1771 to the 1st December 1790, (3) the period subsequent to the 1st December 1790

Grants of land
exceeding one
hundred
bighas.

Regulation XIX declared "that all revenue free grants made since the 12th August 1765 by any other authority than that of Government and which might not have been confirmed by Government are invalid"¹ As regards grants of land, exceeding 100 bighas whether lying in one village or two or more villages and alienated by one grant previous to the 1st December 1790 the Government had the right to resume and assess the lands.² The proprietor of the estate within the ambit of which the lands might be situated had no right to the same³ but if the grant was posterior to the 1st December 1790, the date of the Decennial settlement, the right to resume and assess was in the proprietors of estates or dependant taluqs, and they and their managers were enjoined to resume such lands⁴ Putnidars and owners of similar permanent tenures holding estates or parts of estates, being vested with the right which might well be called proprietary within the meaning of section 10 of the Regulation, had the same powers as proprietors. But notwithstanding the grant of a putni or any other lease in perpetuity, the proprietor of the estate retains the power of bringing resumption suits as the resumption would inure to his own benefit as well as to that of the putnidar.⁵ A reminder is not

¹ Reg. XIX of 1793, Sec. 3.

² Reg. XIX of 1793, Sec. 7.

³ Gopal v. Oodhub W. R. (1864) 156; Beer v. Umakant W. R. (1864) 232; Ram v. Deeso 2 W. R. 279.

⁴ Mahomed v. Umbika W. R. (1864) 132; Barbara v. Moonther Mahomed W. R. (1864) 217; see also, Raj Kishen v. Dhose Bihari 1 Hay 421; Aikowree v. Mohar 2 Ser 115; Herryhur v. Abbas 1 R. J. P. J. 23 (2 Ser 875).

⁵ Okhoy v. Mahomed W. R. (1864) 212.

precluded from resuming lakhiraj land situated in a dependent taluq, though such dependent taluqdar has no right to resume.¹ When land exceeding one hundred bighas was admittedly held by a *lakhirajdar*, the presumption was that it was held under one grant, and that it was resumable by Government and not by the zemindar. In order to rebut the presumption, the zemindar must shew that the land, though beyond one hundred bighas in extent, was held under different sanads.²

If the grant of land in excess of one hundred bighas was made after the 12th August 1765, and previous to the 12th April 1771 in Bengal or the 26th September 1771 in Behar or Orissa, the Government had only the right to assess at revenue called, in vernacular, *nisf-jumma* i. e., equal to one-half of the produce of the land according to the pergunah rate, the grantee being entitled to possession. If any part of the land remained uncultivated, *russudi* or progressive jumma was to be fixed. If the holder of the grant agreed to pay the revenue so assessed, the jumma was to be fixed for ever. The taluqs thus formed were called independent taluqs. If, on the other hand, the grant set up by the holder of the *lakhiraj* land bore a date between the 12th April 1771, or the 26th September as 1771, the case might be according to the Province in which the land was situated, and the 1st December 1790, the assessment was to be made as on ordinary revenue-paying lands according to the rules given in Regulation VIII of 1793.³ If the settlement was accepted by the holder of the land, the estate would likewise be recognised as an independent taluq. If, however, the grantee refused to accept settlement, the land was to be held *khas* and dealt with under the settlement rules as to *khas mahals*. Lands held under grants made after the 1st December

Exceeding
one hundred
bighas

1790

¹ Jugunnath v Pogose 4 W R 43

² Jogendro v Hurry W R (1864) 145

³ Reg XIX of 1793, Sec 8, cl 3

1790 were to be considered as parts of the *mal* or root paying laods of the bolder of the estate within which they might lie, and the proprietors were entitled to eject the holders, whatever the quantity of laod might be¹

Exceeding
ten bighas
but less than
one hundred.

Land not exceeding one hundred bighas not exceeding too bighas, whether lying in one village or two or more villages and alienated by one grant declared invalid, was to form part of the estate or dependant taloq with in the ambit of which the land was situated². Regulations I and VIII of 1793 had declared the right of the State to all lands onassessed at the date of the Decennial Settlement, but Government thought that the revenue payable by holders of permanently settled estates would be better secured if the benefit derived from the resumption of small *akharaj* lands were conferred upon these proprietors, and so it gave up in their favour the right which it undoubtedly had³. If the grantee of land exempt from revenue held under a sanad bearing a date between the 12th August 1765 and the 12th April 1771 in Bengal and the 26th September 1771 in Behar or Orissa he was entitled to hold the laod as a dependant taloq subject to the payment of rent to the proprietor of the estate the amount being fixed in perpetuity by the Collector acting under the revisional powers of the Board of Revenue. The amount assessed was to be in such a case *nisf* (one-half)⁴. But if the sanad propounded bore a date posterior to 1771 and previous to the 1st December 1790, the amount of rent assessable was in the discretion of the revenue officers the full rate being generally levied. The rent of these dependent taloqs was assessable under almost the same rules as those for laods of which revenue was payable to Government.

¹ Reg XIX of 1793, Secs. 10 and 11.

² Reg XIX of 1793, Sec. 6; *Ram v. Deo*, 2 W. R. 379.

³ Reg XIX of 1793, Sec. 6; Reg II of 1819, Sec. 3, cl. 1.

⁴ Reg XIX of 1793, Secs. 5, 6 and 9.

Land not exceeding ten bighas in area was not to be subjected to the payment of revenue if the sanad bore a date between the 12th August 1765 and the 12th April 1771 in Bengal and 26th September 1771 in Behar or Orissa, provided it was found that the produce was "*bonafide* appropriated as an endowment on temples or to the maintenance of Brahmins, or other religious or charitable purposes"¹ This rule was declared to extend also "to all grants of land whatever, not exceeding ten bighas, made previous to the Diwani, the produce of which was in 1793 so appropriated"¹ Lands held under grants subsequent to these dates were declared assessable in the same way as lands exceeding ten bighas.

Not exceed-
ing ten
bighas.

These are the substantive provisions of the Resumption Regulations, but legal practitioners, even in those early days when resumption cases were numerous, had seldom to deal with grants made subsequent to the date of the Diwani. No claimant of *lakhiraj* land, whatever its quantity might be, would think of setting up, if he was disposed to set up a false plea, a title by grant posterior to that date. The only practical questions, therefore, that arose, related to grants, which, if proved, would confer absolute proprietary right to the grantees. If the grants were declared invalid under section 17 of Regulation XIX of 1793, or if no grants were proved, *bona fide* possession could be relied on as evidence of title. The provisions of section 3 of Regulation XIV of 1825 were applicable to all classes of *lakhiraj* lands, and *bona fide* possession could be relied on in proof of title.

Regulation
XIV of 1825

The later Resumption Regulations, of which II of 1819 is the most important, made no alteration in the substantive law as laid down in the Regulation Code of 1793. They modified only the procedure and established special courts for adjudication of claims to hold *lakhiraj*

Jurisdiction in
resumption
cases

¹ Reg. XIX of 1793, Sec 3, cl 4

lands Resumption cases were originally triable by civil courts, the assessment of revenue on resumption being left to the fiscal authorities. Section 30 of Regulation II of 1819 gave concurrent jurisdiction to the civil courts and the Collectors. On the passing of Act X of 1859 a question was raised as to whether section 28 of the Act, which made a material alteration in the law of landlord and tenant took away the right of the civil courts in the country to try resumption cases. In *Gunga Hurry Dhubey v H D Tripp*¹ a Division Bench of the High Court held that a suit by a landlord for resumption of land alleged to have been set up as *lakhiraj* since 1790 was exclusively cognizable by the Collector under section 28 of Act X of 1859. The question subsequently came before a Full Bench, and the majority of the judges held that the Collector and the civil courts had concurrent jurisdiction.² But the question ceased to be of much practical importance, as Bengal Act VII of 1862 took away the Collector's jurisdiction. In such of the Bengal districts in which Bengal Act VIII of 1869 was in force, and on its repeal, Act VIII of 1885 is now in force the Collectors have ceased to have any judicial function in rent cases as well as resumption cases.

Grants made
subsequent
to Decennial
Settlement

Questions were also raised as to the court that should try the procedure that should be adapted and the statements that should be made in the plaint in cases in which the allegation of the proprietor was that the *lakhirajdar* held under a grant made subsequent to the 1st December 1790, or had possession only subsequent to that date.³ Under Act X of 1859 the Collector has concurrent jurisdiction under section 28, and he has exclu-

Gunga v Tripp 1 W. R. 31

¹ *Sonaton v Abdulaziz* W. R. 911; see, D. L. R., F. D., 1071; see also *Mahomed v Lail Beeber* 10 W. R. 103; *Razzoosahib v Moter* 12 W. R. 135; *Ram v Collector* 22 W. R. 49; See 704

Mohammed v Chokew W. R. 5p vol. 81

sive jurisdiction in assessing rent, though he has no jurisdiction in cases for resumption of lands held under grants made previous to the 1st December 1790¹

If the grant is made by the proprietor of an estate, it is binding upon him, his heirs, representatives and assigns, notwithstanding the declarations in the Regulations as to the invalidity of all rent-free grants²

Who may resume.

A purchaser in execution of a civil court decree, a putnidar, or holder of any permanent tenure made since 1790, is a representative of the proprietor, and he is equally bound by such grants³ But the invalidity of such a grant is a good plea, if set up by Government, in case it happens to come into possession under a title paramount or on a sale for arrears of revenue, or if it is set up by persons who may claim under Government or under a sale for arrears of an entire estate. The Government or such a purchaser is entitled to the right as granted by Government on the date of the Permanent Settlement⁴

Grants of land made since 1790 are really rent-free, and the lands are not revenue-free The distinction between revenue-free and rent-free grants is commonly lost sight of, the vernacular words *niskar* or *lakhirdaj* being equally applicable to both classes and used indiscriminately The Bengal Tenancy Act of 1885 has defined the words *tenant* and *rent*, and they include cases in which grantees of land situated within the ambit of an estate hold under grants made by a proprietor subsequent to the Perma-

Distinction between rent-free and revenue-free lands

¹ *Moorobbee v Latoo* W. R., Sp vol, 70, 2 Hay 437

² *Mahomed v. Asadun-nissa* 9 W. R., (F. B.) 1, *contra* *Peezeeroodeen v Modhoosoodun* 2 W. R. (F. B.) 15, *Judoo v Bonomalee* 2 W. R. 295

³ *Mahomed v. Asadun-nissa* 9 W. R. (F. B.) 1, *Dabee v Joy* 12 W. R. 361, *contra*, *Chunder v. Bunko* 3 W. R. 177

⁴ Act XI of 1859, Sec 37, *Koylash v Gocool* 1 L. R. 8 Cal 230, sc, 10 C. L. R. 41; *Dabee v Fuqueer* W. R. (1864) 293, *Nobo v Maharanee* 5 W. R. 191; *Mahomed v. Asadun-nissa* 9 W. R. (F. B.) 1.

neot Settlement.' The grantee or his heirs would be bound to pay but for the contract or grant, rent as holding under permission of the proprietor, for the use and occupation of the land. The relationship between the grantor and the grantee is thus really that of landlord and tenant. Such lakhiraj holdings are rent free lands and not revenue free, and they are resumable by a purchaser on a sale of an estate or tenure free of incumbrances.

Limitation
under Act X
of 1859.

Section 28 of Act X of 1859 repealed, as we have seen section 10 of Regulation XIX of 1793 and the corresponding sections of the other Resumption Regulations, and laid down 'Any proprietor or farmer who may desire to assess any such land or dispossess any such grantee, shall make an application to the Collector, and such application shall be dealt with as a suit under the Act.' The limitation prescribed was twelve years from the accrual of the cause of action but if the twelve years had already elapsed the suit might be brought within two years from the date of the passing of the Act. Clause 14 of section 1 of the Limitation Act (XIV of 1859) also prescribed twelve years as the period of limitation.

Limitation
under later
Acts.

The Limitation Act of 1871^a re-enacted the same rule, with a proviso that no such suit should be maintained where the land formed part of a permanently settled

Act VIII of 1835 Sec. 3, cl. 3 and 5.

- ^a Gokul v Govind I L R. 17 Cal 721. See also I L R. 21 Cal 52.
✓ Dabee v Fazeer W R. (1864) 293; Nobo v Maharajah 5 W R. 191; Bhole v Uma I L R. 14 Cal. 410.

See 3 R. J. P. J. 146; Act X of 1859, Sec. 28.

^b Sonatun v Abdool v W R. (P. D.) 205.

^c Act X of 1859 Sec. 28.

- ✓ Basseerooddeen v Shikhpasand W R. (1864) 178; Rajah v Sookmoy I W R. 291; Janakree v Nabin v W R. (Act X) 23; Khalai v Poorno v W R. 258; Krishno v Joy 3 W R. 23; Dhurpat v Doolah 4 W R. 53; James v Khumroo 7 W R. 531; Ganga v Harro 13 W R. 426; see also L. R. 1859.

Act IX of 1871 Sch. II Art. 130; and see 3 R. J. P. J. 27 and Ser 561.

estate and was held rent free from the time of the Permanent Settlement. This proviso, however, was unnecessary, the sections dealing with the right of auction purchasers on revenue-sales of entire estates having laid down the same rule¹. The proviso to art 130 was accordingly repealed, when Act XV of 1877 was passed². The result seems to be that no title to *lakhiraj* land created before the 1st May 1793, the date of the Permanent Settlement, can now be disturbed³. The period of limitation for suits by Government⁴ is sixty years, but in other respects, the same law applies. Purchases made by Government under Act XI of 1859 are subject to the provisions of that Act⁵. It has been held that *lakhiraj* tenures are incumbrances within the meaning of the Sale Laws, and they can be avoided only if they have come into existence since the Permanent Settlement⁶. I presume there can now be no cases of resumption of revenue-free lands, as they are, by lapse of time, sufficiently protected.

It is necessary to say a few words on the *registers* of revenue-free lands. From the time that the attention of Government was drawn to, what was supposed to be, improper and unauthorised alienations of the share of the State in the produce of lands claimed as *lakhiraj*, and the separate department of Government office, known as the *base zeminduffer*, was established, the importance of keeping registers was felt. Regulations XIX and XXXVII⁶ of 1793 laid down definite rules for the purpose and declared that grantees of *lakhiraj* lands, *badshahi* or otherwise, should, within one year of the issuing of

Registers of
lakhiraj land

¹ Act XI of 1859, Sec 37, Act VII (B C) of 1868, Sec. 12

² Act XV of 1877, Sch 21, Art 130; *Bir v Raj* I L R 16 Cal 449

³ Act XV of 1877, Sch 11, Art 149

⁴ Act XI of 1859, Sec 58.

⁵ *Koylasbashiny v Gocool Moni*, I L R 8 Cal. 230

⁶ Reg. XIX of 1793, Secs 11 to 34, Reg XXXVII of 1793, Secs. 16 to 41

notifications inviting registration,¹ put forward their claims in written applications. The Collectors of districts were, however, busy with other important matters, and notifications inviting claims were not issued in most districts, and even where notices were issued the registers were not duly kept. Regulation VIII of 1800 was, accordingly, passed and it made stringent provisions for the issuing of the notifications prescribed by it.² The Collectors issued notifications under Regulation VIII and in some of the districts numerous applications were filed and registers of claims were prepared. The entries of claims are known as *taidads*, and those of 1802 A.D. (1209 B.S.) are well known. Copies of these entries in the registers kept under Regulation VIII are often put in as evidence of *lakhiraj* title, and, I believe, they are almost always admitted.³ But I doubt whether section 13 of the Evidence Act can be invoked as giving these *taidads* any evidentiary value. It should also be remembered that the registers themselves have seldom been kept in the strict way prescribed by the Regulation. Registers of valid *lakhiraj* lands admitted as such after regular judicial enquiry were used to be kept in the Collectorates and were called C registers.

The Land
Registration
Act.

Under Act VII of 1876 of the Bengal Legislative Council known as the Land Registration Act, provision is made for special registers of revenue-free lands. Register (B) is the general register of revenue-free lands and part 1⁴ contains entries of all lands exempt from revenue in perpetuity held under *badshahi*, *hukami* and other *lakhiraj* grants which have been declared to be valid by competent authority⁵ according to the Regulations. Of the intermediate registers part 1⁶

¹ Reg. XIX of 1793 Sec. 24; Reg. XXXVII of 1793, Sec. 12.

² Reg. VIII of 1800, Sec. 19.

Omiah v. Dakhina, W. R., Sp., vol. 95; and see Sec. 733.

Act VII (B.C.) of 1876 Sec. 4.

Act VII (B.C.) of 1876 Sec. 9.

refers to revenue-free lands¹ The Land Registration Act has made registration compulsory,² and every proprietor, common manager appointed under the Bengal Tenancy Act, or mortgagee in possession must register his name within six months³ Sections 78 and 79 of the Act afford indemnity to raiyats paying rent to the registered owner, manager, or mortgagee in possession, and take away from the unregistered owner the right of suing for rent, though the mere registration of name does not entitle the person, whose name has been registered, to get decrees for rent against tenants without any other evidence of title⁴ But the Bengal Tenancy Act includes these revenue-free lands in the definition of *estate*, and the owners thereof come within the definition of *proprietors*,⁵ and section 60 of the Act entitles the registered owner to a decree for rent without any other proof of title The Land Registration Act does not, however, deal with lands which have not been admitted to be revenue-free by proceedings under the Resumption Laws Registration of the name of the proprietor being compulsory, and no one being bound to pay rent to any person claiming such rent as proprietor unless his name is registered, it has been held that no suit for rent can be maintained, unless the claimant's name be on the register under the Act at the date of suit⁶ Such a rule obviously causes injustice in a great many cases, as the rules of limitation may bar claims before the claimant can obtain a decree for registration *

¹ A& VII (B C) of 1876, Sec 17 ² A& VII (B C) of 1876, Sec 38

³ A& VII (B C) of 1876, Sec 42 As to common manager, see *Maqbul v Girish*, 1 L R 22 Cal 634

⁴ *Ramkrishna v Sheikh Harain*, 1 L R 9 Cal 517, sc, 12 C L R 141

⁵ A& VIII (B C) of 1885, Sec 3

⁶ *Surya v Hemant*, 1 L R 16 Cal 706, *Dhoronidhur v Wajid-unnessa*, 1 L R 16 Cal 708

* In *Ahmuddin Khan v Hira Lal Sen and others* (1 L R 23 Cal 87) the majority of the Full Bench have held that the production of the certificate of registration, when the suit comes on for trial, is sufficient. Such a rule will abate the rigour of the law

Redeemed
lands.

There is another class of revenue free lands which comes within these rules laid down in the Registration and Tenancy Acts namely, lands of which Government has, in consideration of the payment of a capitalised sum granted proprietary title free in perpetuity from any demand of land revenue

The Cess Act.

The Bengal Cess Act of 1880 has also included within the definition of 'estate'¹ the revenue free lands entered in Register B part of the Land Registration Act, and the rights and liabilities of the owners of these lands under the Cess Act are the same as those of revenue paying estates.² The annual amount of road cess and public works cess is calculated upon the annual value, but no deduction is of course allowed as in the case of revenue-paying estates.³ The amount is payable in two equal instalments or in one annual payment on such day or days as the Local Government may appoint.⁴ The amount is recoverable under the Public Demands Recovery Act

The Dawk
Cess Act.

The Dawk cess under Bengal Act VIII of 1862 is not payable by holders of revenue free estates. It was apparently an oversight. But the tax itself, under the present state of things ought not to be levied and the Act ought to be repealed

Estates Par-
tition Act.

Revenue free lands are generally speaking heritable, partible and alienable as *estates* except lands dedicated to pious and charitable purposes as to which the law is somewhat complicated. But they are not partible by the Collector under the Estates Partition Act of 1876. The definition of *estate* in that Act does not include revenue free lands.⁵ The partition of such lands must be made by civil courts,⁶ though the principles⁷ of partition may well be taken from the Estates Partition Act.

¹ Act IX (B.C.) of 1880 Sec 3. ² Gopal v. Adhikari 11 L.R. 10 Cal 743.
Act IX (B.C.) of 1880 Sec 41. Act IX (B.C.) of 1880 Sec 42.
Act VIII (B.C.) of 1862 Sec 4.
Fauchoy v. Janki, 4 B.L.R. App. 14, 15 13 W. R. 74.
Janki v. Lucknow 17 W. R. 137.

9 Subletting of *lakhiraj* lands is common, but the provisions of the Putni Sale Law (Regulation VIII of 1819) are not applicable to permanent tenures created by holders of revenue-free lands. In fact, such subordinate tenures go by other vernacular names, such as *istemrari*, *mukurrari maurusi* &c

Putni Sale Law

The *lakhiraj* lands, which, at the present day, become the subject of resumption-suits in the Bengal Provinces, are lands alleged to be held without any title from a time posterior to the Permanent Settlement, or held under grants made after the Permanent Settlement by holders of estates or permanent tenures. We have already seen that the grantors, their heirs or assigns are bound by the terms of the grants ¹. In cases of adverse possession as *lakhiraj* (without payment of rent), the rules of limitation are strong barriers to claims at the present day ². If the suit is for possession by the proprietor of an estate or a tenure-holder, on the allegation that the land claimed as *lakhiraj* is not really so, but is a part of the *mal* or *khiraji* lands of the estate or tenure, it is for the plaintiff to make out a *prima facie* case that, at any time since the Permanent Settlement, the land was dealt with as *mal*, and the holder of the land or some predecessor of his paid rent for it ³. If the plaintiff is not a purchaser entitled to set

Onus probandi

¹ *Mutty v Deshkar*, 9 W R (F B) 1, *Dabee v Joy*, 12 W R 361, and see *Chunder v Bunko*, 3 W R 177

² *Rungloll v Musst Bhoneshur*, 1 W R 109, *Mahomed Askur v Mahomed Wasuck*, 22 W R 413, *Shaikh Ghogoollee v Shaikh Muzhur*, 24 W R 389, *Erfanoonnissa v Pearee*, 25 W R 209, *Abhoy v Kally*, 1 L R 5 Cal 949, sc, 6 C L R 260, *Sunduri v Mudhoo*, 1 L R 14 Cal 592

³ *Collector v Ganga*, 2 Hay 33, *Tarini v Kali*, 2 Hay 90, sc, *Marshall* 215, *Kedar v Unnada*, 1 W R 25, *Ellias v Tethraram*, 1 W R 164, *Ram v Deeno*, 2 W R 279, *Beharee v Kalee*, 8 W R 451, *Ram v Bistoo*, 15 W R 299, *Nobo v Koylash*, 20 W R 459, sc, 14 M I A. 152, 8 B L R 566, *Mahomed v Reily*, 24 W R 447, *Erfanoonnissa v Pearee*, 25 W R 209, sc, 1 L R 1 Cal 378, *Newaj v Kali*, 1 L R 6 Cal 543, *Akbar v Bhyea*, 1 L R 6 Cal 666, sc, 7 C L R 497, *Bacharam v Piary*, 1 L R 9 Cal 813, sc, 12 C L R 475, *Narendra v Bishun*, 1 L R 12 Cal 182

aside all incumbrances created since the settlement under which he holds proof of receipt of rent or possession within twelve years of the suit must be proved, to remove the bar of limitation. In the case of a purchaser of an entire estate under Act VI of 1859 or of a tenure under Act VII (B. C.) of 1868 desiring to exercise the powers conferred either by section 37 of the former Act or section 12 of the latter Act, or in the case of a purchaser of a putni on a sale under Regulation VIII of 1819 or of any tenure or under tenure sold for its own arrears under the Tenancy Act and entitled to hold land free of incumbrances created by the defaulter the suit must be brought within twelve years of the confirmation of sale.¹ But even in the latter case the suit being within time the burden of making out a *prima facie* title to eject a defendant who claims the land as *lakhiraj* is upon the plaintiff.² The presumption which the Regulation Laws allowed to be made in favour of the proprietors cannot now be invoked. In the language of their Lordships of the Judicial Committee of the Privy Council in the case of *Harihar Mukhopadhyaya v. Madhar Chandra Dabu*,³ — It lies upon the plaintiff to prove a *prima facie* case. His case is that his *mal* land has since 1790, been converted into *lakhiraj*. He is surely bound to give some evidence that his land was once *mal*. He may do it by proving payment of rent at sometime since 1790 or by documentary or other proof that the land in question formed part of the *mal* assets of the Decennial Settlement of the estate. His *prima facie* case once proved the burthen of proof

Act VI of 1859 Sch. II, Art. 121. See also B. C. R. 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 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2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 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3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 38

is shifted on the defendant, who must make out that his tenure existed before December 1790" The presumption arising from long and uninterrupted possession amply rebuts any presumption of the land being *mal*, arising from its being situated within the ambit of an estate The rule thus laid down by the Privy Council has been followed in the case of auction-purchasers in *Erfanoomissa v Pearee Mohun Mookerjee*,¹ in which Justice Mitter is reported to have said—"The presumption that every bigha of land within the ambit of his (the auction-purchaser's) estate was liable to be assessed with Government revenue is not sufficient to start a case for the plaintiff in a suit of the present description, because there is no presumption that every bigha of land within the ambit of an estate must be deemed to have been assessed with revenue until the contrary is proved"² But circumstances may exist, in particular cases, where the plaintiff may be excused from giving *prima facie* evidence of the land being *mal* or rent-paying.³ A purchaser at an auction-sale for arrears, entitled to hold land free of incumbrances, may have to sue the defaulter himself, who may claim the right to hold land as *lakhiraj*, as distinct from the land of which he has been just deprived possession by sale In such cases, it is the obvious duty of the defaulter to shew that his possession as the holder of *lakhiraj* land was based upon title distinct from that to hold as *mal*⁴ In *Newaj Bundopadhya v Kali Prosonno Ghose*,⁵ Garth C J and Field J held that, in a suit for enhancement of rent where the tenant pleaded that

¹ 1 L R 1 Cal 378, sc, 25 W R 209

² See *Nobo v Koylash*, 20 W R 459, *Bishnath v Radha*, 20 W R 465, see also *Bacharam Mundul v Peary Mohun Banerjee*, 1 L R 9 Cal 813, sc, 12 C L R 475

³ *Bishnath v Radha*, 2 W R 465, *Beer v Ram*, 8 W R 209, *Dewan v Mothoora*, 14 W R 226, *Goonomonee v Rajah*, 18 W R 119, *Khorshed v Baboo*, 20 W R 457

⁴ *Ram v Veryag*, 25 W R 534

⁵ 1 L R 6 Cal 543

a portion of the land, rent of which was sought to be enhanced, was held by him as rent free, the onus was on the tenant to make out a *prima facie* case that such portion of the land was so held by him as distinct from *mal* lands. In *Akbur Ali v. Bhyea Lal Ghar*,¹ also, the same judges held that where the defendants admittedly held certain lands within the plaintiff's zemindari, some at least of which were rent paying, the defendants, if desirous of proving that any of these lands was rent free, were bound to give some *prima facie* evidence of this fact before they could call upon the plaintiff, the zemindar, to prove that the whole or any part of the lands was *mal*. But in two later cases *Bacharam Mundul v. Peary Mohun Banerjee*,² and *Narendra Narain Rai v. Bishun Chundra Das*,³ the High Court doubted and distinguished the above rulings.

Weight of evidence.

Questions about *onus probandi* can only arise in determining which of the parties to a suit ought to begin, and which party should fail if no evidence be given by either party. Evidence is, in the large majority of civil cases adduced on both sides and it is desirable that the conclusions of judges should depend upon findings based upon weight of evidence.⁴ Though the burden of proof in any suit is ejectment, on the ground that the land is suit is the possession of the defendant as rent free was since the year 1790 a part of the *malgozari* lands of an estate, is generally on the plaintiff but to say that the plaintiff must discharge the burden by the best and the most satisfactory evidence and that the defendant need not adduce any evidence until the plaintiff has strictly made out his case is giving the rules about the burden of proof an importance which they do not deserve. Undue weight to technical rules frequently leads to failure of justice. Scanty evidence on one side may be quite sufficient, if there is no evidence on the other side to rebut it.

¹ I.L.R. 6 Cal. 665.

² I.L.R. 9 Cal. 813.

³ I.L.R. 12 Cal. 107.

LECTURE IV.

PERMANENTLY SETTLED ESTATES

The history of the Permanent Settlement of Bengal, Behar and Orissa, and of the origin and gradual rise of the class which was benefited or ruined by it, has been repeatedly told by men whose learning and ability command the highest respect. The discussions about the propriety or impropriety of the act by which Marquis Cornwallis, the then Governor-General, declared, with the approbation of the Court of Directors for the affairs of the East India Company, the Decennial Settlement to be permanent and unalterable, cover volumes, and nothing more remains to be said even on a matter of so vast an importance and of so great an historical value (The introduction of the Permanent Settlement by that nobleman whose moderation, love of justice and humanity no one ever doubted, and which indeed the very code of 1793 displays in almost every part of it, has been repeatedly made the subject of rancorous debates and bitter controversies, both sides being partially right and partially wrong. The zemindars were said to have been tax-gatherers and servants of the State, paying into the exchequer amounts fluctuating, arbitrary and unequal. They were, on the other hand, said to be hereditary landlords, having proprietary right like the feudal lords of European countries. When the government of Mr Hastings attempted to ignore their right, made temporary settlements of land-revenue,

*Discussions
as to propriety
of the Per-
manent Settle-
ment*

appointed managers of their estates, and ousted many of them, they complained loudly, and their complaint reached the House of Commons. Statute 24 Geo III cap 25, known as Pitt's India Act, was passed in 1784 the 39th section of which required the Court of Directors "to give orders for settling and establishing upon principles of moderation and justice according to the laws and constitution of India the permanent rules by which the tributes, rents and services of the rajahs, zemindars, polygars, taluqdars and other native landholders should be to future rendered and paid to the United Company." The claim of the zemindars to proprietary right was asserted and denied and discussed hotly even in those early days of the Company's government and you will find the latest dissertation on the subject in Sir William Hunter's *Bengal M S Records* published this year.

The necessity
of the meas-
ure.

The policy of Lord Cornwallis, in fixing for ever the land tax payable to Government was, if I may venture to pass any opinion on the point a matter of necessity, and the despatch of the Court of Directors dated the 29th September 1793 indorsing the Governor General's views was in accordance with the spirit of the age and the views of the Parliament as contained in Pitt's India Act (The necessities of paying the great military and civil establishments of the Company and the dividends to the proprietors required the punctual realisation of the land tax and the amount needed was large. To avoid fluctuation and ensure punctual realisation some means was absolutely necessary to be adopted and the Government adopted not only the best but the event shows the most successful one. The tax was at the time so heavy and the rules adopted for realising it so paralyzing that most of the ancient rajahs and zemindars of Bengal who had the good fortune of the Permanent Settlement being thrust upon them succumbed in the course of a few years. The then prevailing feeling in England about its

own land-tenures, coupled with the exigencies brought on by the revolutionary war, a feeling which resulted in the passing of the statute 38 Geo III cap 60, whereby the tax on landed estates in England was perpetually fixed "subject to purchase and redemption by proprietors," led more than any other cause to the introduction in India of the same principle of giving certainty to the demand of Government upon land.)

The error of the Permanent Settlement was in the application to India of English principles of land law, and the assessment of the tax on insufficient materials. (The *zemindars* were the only class of persons whom in the then existing state of things the Government could look to for punctual realisation of State-dues. There was at the time this important body who had widely different sources of origin, but known to the Mahomedan governors by one name only.) Some of them had long ancestries to tell, beginning at a period coëval, if not anterior, to the Mahomedan conquest of Bengal. Many of them were hereditary princes, owing only financial allegiance to the authority of the Great Moghul or his viceroys. Their law of succession was the law of principalities—*primogeniture*.¹ Even those who were of recent origin were very influential and wielded power not much inferior to that wielded by the very ancient families. The more influential and the intelligent amongst these were, to borrow a modern expression, members of the viceregal council at Murshidabad. They were ministers of state, and the government of the country was practically, to a considerable extent, entrusted to their hands. If we classify them, the first class would represent the old Hindu Rajas of the country, whose ancestors had held independent principalities or principalities that owed only nominal allegiance to the imperial government, either Hindu or

¹ See Raj Kishen v Ramjoy, 19 W R 8.

Mahomedan The Rajas of Assam, Tipperah, Cuch[✓] Behar, Bisheopur, Birbhoom and Chota Nagpur may be placed in this class. The second class consisted of the great laod holding families that came into existence during the Mahomedan government through its sufferance or favour. The Rajas of Rajshahi, Dinajput, Burdwan and Jessore with many others were *de facto* rulers in their own states or territories and used to pay only fixed tribute or land tax. They were like feudatory chiefs. The third and the most numerous class consisted of persons whose families had held offices for collecting revenues for two or three generations and who thus claimed a prescriptive right to hold on. Then there were the reveoue farmers who, since the grant of the Diwan in 1765, had been placed in office and also happened to be called zemindars.¹ Thus all the persons or families known as zemindars in 1790 were not merely collectors of laod revenue or *tehsildars* removable at pleasure. The office of zemindar had, in fact in most instances become hereditary and they paid fixed sums of money to the Nabob's treasury more as tribute than as land revenue. The Nabob sometimes extorted more mooney than the settled or customary amount but that was not by right or law but by might or violation of law. When the Government of India that is to say, the power in England and the Governor General's Council in India agreed in dealing with all these zemindars in the same way as if they were feudal lords[✓] some of them were no doubt raised in position and emolument but the status of many of them was lowered.

Errors of the Permanent Settlement.

Causes much similar to those that led to the feudalization of Europe after the fall of the Carlovingian dynasty were in force in India at the beginning and middle of the Eighteenth Century and when the English found them else masters of the country,

they saw a state of things very much similar to the feudal government of the Middle Ages. Consciously or unconsciously, Lord Cornwallis was thus led to introduce an imitation of the English system of landed property.¹ The State assumed to itself and made over to the zemindars its own supposed proprietary right to the soil, as if the cultivators had no right to hold land against the will of the Government and its grantees. Deeper and closer observation, however, would have disclosed, underlying the upper layer, conditions of life and ideas of legal rights and obligations dissimilar to any with which Englishmen were familiar, and they consequently failed to grapple with, far less, to appreciate them. The words of Sir John Shore were of no effect. To repeat the words of the preamble to Regulation II of 1793, "the property in the soil was formally declared to be vested in the landholders," but adequate provision was not then made for the protection of the class of persons who were the real proprietors of the soil and who deserved for their weakness the largest amount of protection from the hands of Government.

The haste with which the amount of revenue was fixed was another cause of defect in the Permanent Settlement. The revenue fixed was so high that, within the course of fifteen years, the Rajas of Nadia, Rajshahi, Bishenpur, Dinajpur, Kasijora and many others almost submerged under its wave. The Birbhoom zemindar was completely ruined. A host of smaller zemindars shared the same fate. It is perhaps scarcely too much to say that in a few years a complete revolution took place in the constitution and ownership of the estates which formed the subject of the Settlement. The dismemberment was quick, and the ruin subversive of its very principles. The revenue assessed on other

Settlement
made on in-
sufficient
materials

¹ Hunter's Manuscript Records, p. 45

estates did not include the then unknown item of waste land, and many estates situated at a distance from the metropolis escaped rather cheap. Only the Raja of Burdwan, heavily assessed as his estates were, escaped through an accident.

Opinion of
financiers.

(Financiers in India now regret that there was this Permanent Settlement, as the zemindars of the present day make large profits. That some of them do make profit is undoubted. A good many of them, however derive title by purchase; i.e. outlay of large capitals. These financiers think that it is the State and not the zemindars who should have profited by the increase of the cultivated area in Bengal and the more manifold increase in the value of the produce. But they forget that the East India Company would have been reduced to bankruptcy, if they had not adopted the principle of permanent settlement; they forget that the vested rights of a large number of zemindars required permanent settlement and that, taking all things into consideration, the State has not suffered—the ancient Rajas and the cultivators of the soil have suffered. In fact notwithstanding the Permanent Settlement the amount of revenue has increased from Rs 285 87 72 in 1790-91 to Rs 370 11 385 in 1892-93 exclusive in the latter year of a good many districts. The best authorities I think, are now agreed that the adoption of the principle of the Permanent Settlement was not a mistake.)

Regulation
I of 1793.

Regulation I of 1793 passed on the 1st May 1793 by his Excellency the Governor General in Council contains the Proclamation making the Decennial Settlement of Bengal Behar and Ori a *permanent* one. At that time contained only a portion of the district of Hughli and Midnapur—it included only the tract of country lying between the *Impranassara* and the

Survernackha Orissa proper, which was conquered from the Malrattas in 1803, is even now, as you have seen, subject to a temporary settlement. The Decennial Settlement was commenced in 1789 and completed in 1791. The temporary settlements made from time to time before that year had been found unsuccessful in a financial point of view, and the Proclamation was issued on the 22nd March 1793, by which the Governor-General in Council declared, with the concurrence of the Court of Directors, that the *zemindars, independent taluqdars* and other actual *proprietors* of land, with whom the Decennial Settlement had been concluded, would be allowed to hold their estates at the same assessment for ever, "and that the jumma, which might be hereafter agreed to by the proprietors, whose lands had been held khas or let in farm, be fixed for ever"¹. But "no claims for remission or suspension of rent was to be admitted on any account, and lands of proprietors were to be invariably sold for arrears"². Proprietors were also declared to have the privilege of transferring their lands without the sanction of Government, and partition or division of estates was to be freely allowed³. These were the main provisions of the Regulation, which has sometimes been said to be the "charter of the landed aristocracy of Bengal". The Government reserved the right to enact such regulations as might be necessary for the protection and welfare of the dependent taluqdars, raiyats and other cultivators of the soil, without detriment to its right to levy the fixed sum payable by the actual proprietors as revenue⁴. But, as you will presently see, the power was not exercised until very recently.

Regulation I of 1793 should be read along with Regulation VIII of that year, as it contains the principles

Regulation
VIII of 1793.

¹ Reg I of 1793, Sec 5

² Reg I of 1793, Sec. 7

³ Reg I of 1793, Secs 9 and 10

⁴ Reg I of 1793, Sec 8, cl 1.

of settlement and the mode of assessment. Section 4 of the latter Regulation enacted—'The settlement under certain restrictions and exceptions hereafter specified shall be concluded with the actual proprietors of the soil of whatever denomination, whether *zemindars, taluqdars or chowdhuris* ¹ These taluqdars are called in the Regulations *independent taluqdars* who were entitled to hold land with all the privileges of *zemindars*, paying revenue direct to Government. Section 5 of the Regulation specifies who these *independent taluqdars* are ² while the following three sections deal with taluqdars who are not independent. I have already said ³ that some lands were held under grants made by the Mahomedan government as *malgusari aymas* &c on payment of fixed sums as quit rent, and those granted for the benefit of learned men and colleges were classed as *independent taluqs* while *malgusari aymas* granted *bond fide* for the purpose of bringing waste lands into cultivation were to be classed with other *jungleburi taluqs* as *dependent*

¹ Reg. VIII of 1793, Sec. 4.

² The Taluqdars to be considered the actual proprietors of the lands composing their *taluqs* are the following:—

First—Taluqdars who purchased their lands by private or at public sale or obtained them by gift from the *zemindar* or other actual proprietor of land to whom they now pay the revenue assessed upon their *taluqs*, or from his ancestors subject to the payment of the established dues of Government and who received deeds of sale or gift of such land, from the *zemindar* or *zamindars* from the *ikhtars* making over to them his proprietary rights therein.

Second—Taluqdars whose *taluqs* were formed before the *zemindar* or other actual proprietor of land, to whom they now pay their revenue or his ancestors succeeded to the *zemindari*.

Third—Taluqdars the lands comprised in whose *taluqs* were never the property of the *zemindar* or other actual proprietor of the soil, to whom they now pay their revenue or ancestors.

Fourth—Taluqdars, who have succeeded to *taluqs* of the nature of those described in the preceding clauses by right of purchase gift or inheritance from the former proprietor of such *taluqs*.

³ *Annex* p. 65

*talucs*¹ Regulation VIII of 1793 also contained the general rules for other permanent settlements and provisions as to the existing subordinate rights in land, the rights of the settlement-holders in relation to raiyats, and rules as to *sayer* compensation and zemindar's private *chakran* lands. Many of the sections of this Regulation have been formally repealed, and with the exception of those that deal with the substantive rights of the different classes of persons interested in land, the Regulation itself is now of little practical use. The rules of assessment laid down in the Regulation were the basis of further permanent settlements, and they continued to be in force until 1822, when they were considerably modified. Permanent settlements continued to be made until about the year 1871,² and thus the permanently settled area in the Bengal Provinces is now very large.³

The Regulation Code of 1793 laid down, with sufficient precision, the rules intended to govern the legal relation between the State and the proprietors with whom permanent settlements were concluded, but they occasionally required explanations, modifications and additions, as experience and altered state of things from lapse of time demanded. Much of the complications now existing in the law relating to landlord and tenant in the Bengal Provinces is due to modifications and amendments

Changes
made since
1793

¹ Reg. VIII of 1793, Sec. 9

² *Ante* p. 51

³ The permanent settlement extends over the following districts —
Bengal — Burdwan, Bankura, Birbhum, Hughli, Howrah, 24-Perganas, Jessore, Nadia, Murshedabad, Dinajpur, Malda, Rajshahi, Rungpur, Bogra, Pubna, Maimensing, Faridpur, Backerganj, Chittagong, Noakhali, Tipperah, Dacca, portions of Chota-Nagpur, Julpauri and Sylhet

Behar — Patna, Gya, Shahabad, Tirhoot, Sarun, Champaran, Purnea, Bhagulpur, Monghyr and part of Sonthalia.

Orissa — Midnapur

Assam — Part of Goalpara.

made now and then since 1793. The exact extent of the repeal, made indirectly and by implication is difficult even for professional lawyers to discover. The Laws of Local Extent Act and the Repealing Act (Acts XV of 1873 and XVI of 1874) are not sufficient to guide us safely through the labyrinth.

Sicca and
Company's
R. pec.

The settlement holders, their heirs, successors and representatives were exempted from any additional demand of revenue. In the words of the Proclamation issued on the 22nd March 1793, the assessment was irrevocable and unalterable.¹ They were on the other hand to pay into the exchequer the assessed amount without any abatement. The original assessment and the mode of payment were by *sicca* Rupees. In 1835 the Rupee known as the Company's Rupee was declared to be legal tender for the Calcutta *sicca* Rupee and the value of the Company's Rupee was declared to be fifteen sixteenths of the *sicca* Rupee.² Act VII of 1835 came into operation on the 1st September 1835 and since then the amount of revenue payable by every settlement holder was increased by one sixteenth. This however was not an actual alteration in the amount of the revenue.³

Dawk Cess.

The Bengal Legislature passed in 1862 an Act for improving the system of Zemindari Dawks in as much as the conveyance of letters on public service between Police officers and Police stations and the Magisterial offices was defective, irregular and uncertain and as fund was required to improve the system.⁴ Magistrates of districts were empowered to raise annually the total sum necessary for postal service known as the Zemindari Dawk Service. The apportionment is ratable on the *sadder jumma* subject to the approval of and revision by the Commissioner of the Division. The payment is required to be made half yearly in advance.

¹ Reg. I of 1771, Sec. 7. ² Act VII of 1835.
³ *Halder & Shukla*, 1 W. R. 245. ⁴ *Regulation* 1 of 1862 (B.C.) of 1862.

and double the amount is levied in default ¹ The amount is recoverable under the Public Demands Recovery Act The performance of the duties for which the tax was originally imposed is now actually under the control of the Government Postal Department, and, except in isolated tracts, no zemindari dawk is maintainable between any two places,² but the Dawk cess continues to be levied as rigorously as in 1862, as an additional impost upon the sudder jumma It is now a legalized *abwab* ³ The Dawk cess is not recoverable from under-tenants or raiyats without special contract, and even where there is a contract it is not realisable as rent ⁴

(The Bengal Legislature passed in 1871 an Act for *local rating* for the construction and maintenance of roads (Act X of 1871) The rate was local, and persons interested in land and being in possession, zemindars, tenure-holders and raiyats, all were to contribute to the fund,—zemindars being primarily liable to Government) This Act was followed by Act II (B C) of 1877, known as the Provincial Public Works Cess Act The Settlement Proclamation required the zemindars to improve their estates, making use of the profits secured to them by the fixity of revenue, and if they failed to execute and maintain works of public utility, the State could interfere and compel them to do so But how far the terms of the Proclamation would permit the State to levy cesses for the construction and maintenance of roads and for other works of public utility, or for a fund for use at times of scarcity and famine for relief works, is a question which has been a constant topic of discussion

Road and
Public Works
Cesses

These Acts were consolidated with amendment in the Bengal Cess Act (IX of 1880), which is now in force.

The Cess Act
of 1880

¹ Act VIII (B C) of 1862, Sec 9 ² Act VIII (B C) of 1862, Sec 4

³ Bissonath v Ranee Shurno Moyee, 4 W R 6

⁴ Act VIII (B C) of 1862, Sec 12, Ruttun Monee v Jotendro, 6 W R (Act X) 31, Maharajah v Sadha, 8 W R 517, Erskine v Trilochun, 9 W R 518

The amount levied under this Act is an addition to the ~~assessed~~ revenue though it is not realised as such. These cesses are personal debts of the proprietors and are not charges¹ on the estate or tenure for which they are due, and cannot be realised by sale of such estate or tenure, if the debtor's right has passed to a third person. They are recoverable by the procedure laid down in the Public Demands Recovery Act². Under section 41 of the Cess Act—'Every holder of an estate shall yearly pay to the Collector the entire amount of the road cess and public works cess calculated on the annual value of the lands comprised in such estate, at the rate or rates which may have been determined for such cesses respectively for the year as was in this Act provided, less a deduction to be calculated at one half of the said rates for every rupee of the revenue entered in the valuation roll of such estate as payable in respect thereof. The Collector is to prepare the valuation roll of each estate the annual value of the lands comprised in it being determined either summarily or from materials supplied in accordance with the rules laid down in the various sections of the Act³. The maximum rate for every rupee of the annual value is half an anna for each of the cesses and the maximum is now levied in almost all the districts in the Bengal Provinces. The amount payable to the Collector if the full rate be levied is in the words of section 41 one anna for every rupee less half an anna for every rupee of the revenue payable to Government. Supposing an estate is valued by the Collector at Rs. 1000, and the revenue payable is Rs. 700, the amount pay

¹ *Shekari v. Sastri* 1 L. R. 19 Cal. 731; *Mahomed v. G.* 17 L. R. 10 Cal. 827 and the same case *G. v. Secretary* 1 L. R. 17 C. 1414.

² As to sales under certificates under the Public Demands Recovery Act see *S. Ch. Saran v. Pan* 10 L. R. 14 Cal. 11; *Ram v. M.* 10 L. R. 14 Cal. 9; and *Moni Jai v. Saravati* 1 L. R. 19 Cal. 123. As to mode of service of notice see R. 15 L. R. 12 Cal. 675.

³ A.C. 18 (B. C.) 1883, Decs. 14 to 25.

able for the two cesses together is 1,000 annas *minus* $\frac{1}{2}$ of 700 annas, that is to say, Rs 40-10 as. As we shall presently see, a part of this amount is recoverable by the holder of the estate from subordinate tenure-holders and raiyats and holders of rent-free lands, and the amount payable under the law by him from his own profit is 300 half-annas, that is to say, Rs 9-6 as. The principle is that every holder of land must pay half an anna per rupee of his profit, the raiyat or actual cultivator paying half an anna per rupee of the rent payable by him. So that the holder of an estate is made to pay an additional sum besides the revenue, and he is primarily liable to Government for the entire amount of cesses payable to the State. The days for payment by the holders of estates to the Collector are the same as those fixed for the payment of the instalments of revenue, but the instalments of cesses are equal.¹ In most of the districts in the Bengal Provinces, the amount is payable in four instalments except in cases of small estates. The instalments of revenue, however, are generally unequal.

The Income Tax,² which, there is every reason to apprehend, will be permanent, is not payable for profits derived by zemindars from their estates. But estates or parts of estates situated within municipalities are exempted from the operation of the Cess Act of 1880. Income Tax is payable in respect of such estates.

The Income
Tax Act.

The payment of revenue, which is a charge on the land, demands our special attention. It is a liability on the land as a first charge and is realisable by Government, in the first instance, by the sale³ of the land for which the arrear is due.

Sale for
arrears of
Revenue.

The original engagements with the proprietors and farmers of land were for the payment of the annual revenue in monthly instalments, the amount of each instalment varying generally with the instalments of rent

History of the
Sale Laws

¹ Act VIII (B C) 1880, Sec 42, cl 1

² Act II of 1886

³ Reg I of 1793, Sec 7

recoverable from raiyats. An arrear of revenue has been defined to be "the whole or portion of the kist or instalment payable in any month and remaining undischarged on the first of the following month"¹ On an arrear of revenue being due, the Collector, under the law as originally framed, was required to serve a notice on the defaulter and on his failure to pay, notwithstanding the service of the notice the Collector had the option of confining the proprietor.² The Board of Revenue only might direct the sale of the whole or a portion of the estate of the defaulter, but the sanction of the Governor-General in Council was in every case necessary.³ If the proceeds of the sale were not equal to the Government demand other properties of the defaulter might be sold to make good the deficiency.⁴ Before the end of the year 1793 the law had to be modified, restrictions were placed on the powers of the Collectors to direct the confinement of proprietors and sales of estates were directed to be advertised even without the sanction of the Governor-General but no sale was to take place without such sanction.⁵ A material alteration was, however, made in the law by Regulation VII of 1799 the practical effect of which was that the confinement of defaulters for non payment of revenue was abolished, the personal properties of defaulters and their sureties were made liable to be attached⁶ and the Board of Revenue was for the first time authorised to conduct sales.⁷ The next Regulation on the subject was I of 1801 but it made no material alteration in the law. Regulation V of 1812 made an important alteration as regards payment of inter

¹ Reg. XIV of 1793, Sec. 2; Act VI of 1832, Sec. 2.

Reg. XIV of 1793, Sec. 4.

Reg. XIV of 1793, Sec. 12; *Min. & Genl. S. W. R. (P. C.)* 41
10, 12, 1 A, 383.

Reg. XIV of 1793, Sec. 41.

⁵ Reg. III of 1794.

Reg. VII of 1793, Sec. 23.

Reg. VII of 1793, Sec. 32.

est on arrears¹ The liability to penalty directed to be imposed by the previous Regulations was removed and interest at twelve per cent per annum was made chargeable, unless the same was remitted by the Board of Revenue By Regulation XVIII of 1814, a further modification was made, which dispensed with the previous sanction of the Governor-General in Council for sales of estates and gave to the Collectors of Districts larger powers In the year 1822 when sales became less frequent and the necessity of superintendence by the superior officers of revenue became smaller, the Board of Revenue was vested only with the revisional power of annulling sales², and civil courts were empowered under certain circumstances to set aside revenue-sales. In 1841 Act XII was passed, discontinuing the levying of interest and penalty upon arrears, appointing fixed days for payment of revenue, and providing fixed dates for sales of estates in arrear

The law as to revenue-sales was considerably modified A&I of 1845 by Act I of 1845 It is not necessary to go into the details of the rules laid down by this Act, as it was with slight modifications reproduced in Act XI of 1859—the sale-law, which, with certain modifications made by Act VII (B C) of 1868, is now in force You will find in the reports several cases on the Act of 1845, and I shall advert to them when referring to the corresponding sections of the existing law There is, however, one leading case on the construction of section 9 of the Act of 1845 which deserves attention, as it is often quoted—*viz*, the case of Nagendra Chundra Ghose v Kamini Das³ Kamini Das was a Hindu widow in possession of her husband's estate as his heiress Nagendra Chundra had deposited money under section 9 of the Act to protect his interest as mortgagee of a revenue-paying estate belonging to Kamini Das as heiress of

¹ Reg V of 1812, Sec 28

² Reg XI of 1822

³ 8 W R, (P C.) 17, sc, 11 M I A 241

Nagendra
Chundra &
Kamini Dasi.

her husband when the estate was about to be sold for arrears of revenue she having defaulted to pay. The question that was raised in the suit instituted by Nagendra Chundra for the recovery of the money deposited by him was whether the amount deposited by him for the protection of the estate was a charge on the inheritance, or whether it was a personal debt of the widow, Kamini Dasi. The Judicial Committee of the Privy Council held upon the construction of section 9 of the Act that the amount of deposit with interest was recoverable from the proprietress and that it was her personal debt. The Judicial Committee however, was of opinion that 'considering that the payment of revenue by the mortgagee did prevent the taluq from being sold their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person, who had such an interest in the taluq as entitled him to pay the revenue due to the Government and did actually pay it was thereby entitled to a charge on the taluq as against all persons interested therein for the amount of the money so paid. Their Lordships however, dismissed the suit as they could not having the express words of section 9 of the Act before them, apply the general principle stated in the words I have quoted from the judgment. Section 9 of the Act of 1845 was amended by Act VI of 1859 and holders of lien on estates were reasonably secured.'

Acts VI of
1859 and VII.
(N.C.) of 1868.

Act VI of 1859 which with Bengal Act VII of 1868 regulates at the present day the procedure for recovery of arrears of revenue is about to be repealed and a Bill is now under the consideration of the local legislative council. I hope that in amending these Acts our local Legislature would give their serious attention to the imperfections of the present law which in many instances have been found to work the greatest injustice. Cases are not rare in which sales

take place of valuable estates at extremely inadequate prices and for petty arrears, the non-payment of which did not arise from inadvertence, or neglect, or want of means of the proprietors, the Commissioners of Revenue, however, do not think it proper to set them aside for reasons which it is difficult to appreciate. The sales of estates with revenues less than Rs 500, and of which the number is very large and is increasing every year on account of partition and separation of shares, have been found to be still more injurious, as these sales are not advertised in the Official Gazette. The publication of the notices required by the Act are left to ignorant and ill-paid agents, who are often required to serve notices on the lands of estates of which they have no personal knowledge. The punctuality with which the revenue of the permanently settled estates in Bengal are now realized is no doubt due, to a considerable extent, to the stringent provisions of the "sunset laws", but the time has come for further legislative enactment for the protection of capitalists, who are absolutely necessary for the commercial interest of the country, and of those holders of estates who have parted with direct possession in favour of tenure-holders and mortgagees. Stricter rules for the publication of the fact of the non-payment of revenue, for the service of notices of sale and the like, a revival of the law for personal service on defaulters, and greater facilities for setting aside sales on payment of penalty, may, to a considerable extent, lessen the rigour of the present law. Sales for arrears of revenue are not of constant occurrence, as is supposed by the Judicial Committee of the Privy Council in *Gobindolal v Ramjanam Misser and others*.¹ There is now no reason for any apprehension that "any thing which impairs the security of purchasers at those sales tends to lower the price of the estates put up for sale". As a matter of fact, many of the sales for arrears of revenue that are attempted to be set aside are

¹ I L R 21 Cal 70, *sc* L R 20 I A. 165

brought about for serving the fraudulent purpose of defeating rightful owners, creditors and incumbrancers. If on the other hand, the estate is sold at an adequate value, seldom, if ever, is an application made for setting aside the revenue sale.

Instalments
of revenue
and payment
thereof

But the Bill to amend and consolidate the existing provisions of the Sale Law may like many others be shelved, and I think it proper to give here a short summary of Act XI of 1859 and of the Bengal Acts modifying the same in so far as they bear on the present subject. The *kists** or instalments of revenue are

* Table of latest dates fixed for the payment of the revenue of all classes of estates in all districts:—

	Estates paying an annual revenue not exceeding Rs. 10.	Estates paying an annual revenue exceeding Rs. 10, but not exceeding Rs. 50.	Estates paying an annual revenue exceeding Rs. 50, but not exceeding Rs. 100.	Estates paying an annual revenue exceeding Rs. 100.
In districts where the Bengali or Amli era prevails, except the division of Orissa and the district of Chittagong.	25th March	{ 15th January 25th March.	{ 15th January 15th January 25th March.	{ 15th January 25th March. 15th January 25th March.
In districts where the Fasil era prevails.	25th March	{ 15th January 25th March.	{ 15th January 15th January 25th March.	{ 15th January 25th March. 15th January 25th March.
In the division of Orissa.	15th November	{ 15th April for the 1st panna 15th November for the 2nd panna 15th November for the 3rd panna	{ 15th April for the 1st panna 15th November for the 2nd panna 15th November for the 3rd panna	{ 15th April for the 1st panna 15th November for the 2nd panna 15th November for the 3rd panna
In the district of Chittagong.	25th June	{ 25th May 25th February	{ 25th May 25th February	{ 25th May 25th February
ALL PATAES.				
Darjeeling	—	{ 15th January 25th March.	{ 15th January 25th March.	{ 15th January 25th March.
Ilarbhagh (except Kh. rek. d. h.)	25th March	{ 15th January 25th March.	{ 15th January 25th March.	{ 15th January 25th March.
Loh. rd. g. s.	—	{ 15th January 25th March.	{ 15th January 25th March.	{ 15th January 25th March.
M. s. b. s.	—	{ 15th January 25th March.	{ 15th January 25th March.	{ 15th January 25th March.
M. b. s.	—	{ 15th January 25th March.	{ 15th January 25th March.	{ 15th January 25th March.
Kharai & Ilarbhagh	25th March	{ 15th January 25th March.	{ 15th January 25th March.	{ 15th January 25th March.

not now payable monthly Section 3 of the Act empowers the Board of Revenue to determine upon what dates arrears of revenue shall be paid in each district under their jurisdiction If any quarterly instalment is not paid up before the sunset of the latest day thus fixed, the estate practically lapses, and the defaulter has no right to bar or interfere with the sale by subsequent payment or tender of payment,¹ but the Collector has the power at any time before commencement of the sale, and the Commissioner at any time before the final bid is accepted, to exempt the estate from sale by recording a proceeding, giving the reason for granting such exemption² The order of the Commissioner, however, has no effect if it reaches the Collector after sale The mere receipt by the Collector of the arrears of revenue after the latest day, without an express order for exemption, is not enough to prevent the sale, or invalidate a sale that has taken place³ If there is no arrear and all sums due as revenue have been paid by the proprietor or any person on his behalf before the sunset of the latest day, no sale can take place, and if by inadvertence or mistake a sale does take place, the sale should be set aside, and the Civil Courts may interfere, the sale being one not under the Act⁴

¹ Act XI of 1859, Sec 6, *Gossain v Ishri*, 1 L R 21 Cal 844
See also *Azimuddin v Secretary*, 1 L R 21 Cal 360

² Act XI of 1859, Sec 18, *Mohabeer v Collector of Tirhoot*, 13 W R 423

³ *Gobind v Sherajunnissa*, 13 C L R 1; *Gauri v Janki*, 1 L R 17 Cal 809, *Gobind v Ramjanam*, 1 L R 21 Cal 70

⁴ *Byjnath v Lalla Seetul*, 10 W R 66 (F B) *sc*, 2 B L R 1 (F B), *Sreemunt v Shamasoondree*, 12 W R 276, *Munjina v Collector*, 12 W R 311, *sc*, 3 B L R App 144, *Thakoor v Collector*, 13 W R 336, *Hurgopal v Ramgopal*, 13 W R 381, *sc*, 5 B L R 135, *Ramgobind v Kushuffudoza*, 15 W R 141, *Gauri v Janki*, 1 L R 17 Cal 809, *sc*, L R 17 I A 57 See also *Gobind v Ramjanam*, 1 L R 21 Cal 70 (83), *Gossain v Ishri*, 1 L R 21 Cal 844 As to sales for arrears of cesses where really there are no arrears, see *Gujraj v Secretary*, 1 L R 17 Cal 414 and the same case in P C, *Mahomed v Gujraj*, 1 L R 20 Cal 826

Deposit in the
Collectorate

A deposit in the collectorate to the credit of the proprietor or even of the estate in arrear, sufficient to cover the amount of revenue payable to Government, is not enough to exempt the estate from sale, unless the Collector has been asked by especial petition on or before the latest day to appropriate the amount in deposit to the satisfaction of the amount payable as revenue.¹ The existence of such deposit in the collectorate or the fact that the arrear was small and that it was not put in owing to inadvertence or mistake, may only be a reason for inducing the Collector or the Commissioner of Revenue to grant exemption from sale, and it may also be a good reason for setting aside the sale when it has taken place on the ground of hardship or injustice.² But the deposit of money or Government securities endorsed and made payable to the order of the Collector under the provisions of section 15 of the Act would protect the estate from sale such deposit being considered as actual payment made before the latest day.³

Sale-notification.

When default has been made in the payment of revenue on the latest day provided therefor the Collector is required to issue two sets of notices. The first set is to contain a particular description of the estate or share of estate in default the revenue assessed thereon and the date fixed for sale and one of these notices is required to be affixed in the court house of the District Judge and the other in the office of the Collector who is to hold the sale. The day fixed for sale should not be less than thirty days from the date of the affixing of the notification in the Collector's office. If the annual revenue payable for the estate or share of estate in default exceeds the sum of Rs 500 a notification of the sale should also be published in the Official Gazette.⁴ The other set of notices is required

¹ A.O. XI of 1842 See R.

² A.O. XI of 1842 See A. J. W. M. v. Collector B.N. R. 472

³ A.O. XI of 1842 See 13

⁴ A.O. XI of 1842 See C. A.O. VII (N.C.) of 1842 See 3

to be published for the benefit of under-tenants and raiyats who are thereby forbidden to pay rent to the defaulter. They are required to be published and affixed at the Collector's office, at the Moonsiff's court, at the Subdivisional cutchery, at the Police stations within the jurisdiction of which the lands of the mahál in arrear lie, and at the principal cutchery of the mahál or some conspicuous part thereof ¹ The non-publication or any irregularity in the publication of any or all of these notices is, however, not sufficient to vitiate the sale. That may amount to irregularity but not illegality, making the sale absolutely void. Even if the date fixed for sale be within thirty days of the affixing of the notification in the Collector's office, the sale that follows will not be a nullity, and Civil Courts cannot set it aside on that ground, but such sale may be annulled on proof of substantial injury by reason of the irregularity complained of ² It should, however, be noted that the Court cannot infer, in the absence of direct evidence, that inadequacy of price is due to irregularity, ³ and the non-publication of the notification under section 7, which is intended for the benefit of the purchasers, cannot amount to material irregularity in publishing the sale. The Commissioner of Revenue has the power, on an appeal being presented to him within sixty days from the date of sale or forty-five

¹ Act XI of 1859, Sec 7, Act VII (B C) of 1868, Sec 7. As to what omissions in the sale-notification are not material, see *Zerkalee v Doorga*, 16 W R 149, *Secretary v Rasbehari*, 1 L R 9 Cal 591, *sc*, 12 C L R 27, *Amirunessa v Secretary*, 1 L R 10 Cal 63, *sc*, *Amirunessa v Browne*, 13 C L R 131, *Ram v Mahabir*, 1 L R 13 Cal 208. And as to irregularities, see *Cornell v Oodoy*, 8 W R 372.

² *Womesh v Isharutoollah*, 8 W R 439, *Luleeta v Collector*, 19 W R 283, *Gobind v Sherajunnissa*, 13 C L R 1, *Balmokoond v Jirjudhun*, 1 L R 9 Cal 271, *sc*, 11 C L R 466, *Mobaruk v Secretary*, 1 L R 11 Cal 200, *Gobind v Bipro*, 1 L R 17 Cal 398, *Mahomed v Raj*, 1 L R 21 Cal 354.

³ *Maharajah v Hurruck*, 9 M I A 268, *Mahabeer v Collector*, 15 W R 137, *Mahomed v Raj*, 1 L R 21 Cal 354. See also *Mobaruk v Secretary*, 1 L R 11 Cal 200.

days, if presented to the Collector for transmission to the Commissioner to annul the sale, if it appears to him not to have been conducted according to the provisions of the law, and he may also lay down terms for payment of compensation to the purchaser.¹ A sale may also be set aside under section 26 of Act VI of 1859 on the ground of hardship.

Notice under
Sec 5 of Act
VI of 1859.

An exception is made in the case of arrears other than those for the current year or for the year immediately preceding arrears due on account of estates other than that to be sold and arrears of estates under attachment by order of any civil judicial authority² whether the attachment be of the whole or of a part and of estates managed by the Collector in accordance with such order.³ In such cases the law declares that the estates shall not be sold otherwise than after a notification shall have been affixed at the courts of the District Judge and the local Munsiff at the police station and also at the cutchery of the payer of the revenue, or at some conspicuous place of the locality for a period of not less than fifteen clear days preceding the date fixed for payment to the office of the Collector. This notification is imperative and its non-service is a material irregularity for which the sale for arrears may be set aside. This provision as to special notice however applies only where the attachment has been effected at least fifteen days before the last date fixed for the payment of any instalment of revenue for which it is sought to bring the estate to sale.⁴

¹ Act VII (B.C.) of 1859 Sec. 2. *Womesh v. Collector* 8 W. R. 437, *Goud v. Ram* 1 L. R. 21 C. 1 & 2 L. R. 201 A. 173.

² Act VI of 1859 Sec. 5. An attachment under Sec. 10 of the *Revenue Recovery Act* is not a judicial process. *Parm v. Munsiff* 1 L. R. 13 Cal. 224.

³ Act VII (B.C.) of 1859 Sec. 11. *Bowen v. Munsiff* 12 B. L. R. 277 & 1 L. R. 11 A. 63.

⁴ *M. L. v. Co.* 11 & 13 W. R. 1371, *Gowshi v. Radha*, 1 L. R. 22 Cal. 732.

Section 6 of Act XI of 1859 does not require that the name or names of the proprietor or proprietors should be specified in the notice, and no analogy can be drawn in this respect between a sale by the civil court and that by the Collector ¹

Notice under
Sec 6 of Act
XI of 1859.

The jurisdiction of civil courts to set aside revenue-sales is of an extremely limited character. A suit to set aside a revenue-sale must be brought within one year from the date when the sale is confirmed and becomes final ² The sale becomes final at the noon of the sixtieth day from the date of sale, that day being included, and if an appeal be preferred, from the date of the dismissal of the appeal by the Commissioner, if such date be beyond the sixtieth day. The ground or grounds for setting aside the sale by a civil court must be such as has or have been declared and specified in the petition of appeal to the Commissioner, and no sale can be set aside unless such appeal has been preferred and the ground or grounds specifically taken ³. But if there is illegality and not mere irregularity, or the sale is a nullity, there being no arrears, no appeal to the Commissioner is necessary before suit ⁴. No person who has received the purchase-money or any part thereof is entitled to contest the legality of the sale ⁵.

Suits to set
aside revenue
sales

There is another difficulty as to the exercise of the power of civil courts in setting aside sales on the ground of material irregularity. Under section 8 of Bengal Act

Act VII
(B C) of
1868, Sec 8

¹ Secretary v Rasbehari, 1 L R 9 Cal 591, Amirunessa v Secretary, 1 L R 10 Cal 63; Gobind v Sherajunnissa, 13 C L R 1, Ramnaran v Mohabir, 1 L R 13 Cal 208

² Act XI of 1859, Sec 33, Act XV of 1877 Schedule II, art 12, cl, (c), Raj v Kinoo, 1 L R 8 Cal 329

³ Mohun v Collector of Tirhoot, 1 W R 356, Womesh v Collector of 24-Perg, 8 W R 439, Gobind v Sherajunnissa, 13 C L R 1, Gauri v Janki, 1 L R 17 Cal 809, Gobind v Ramjanam, 1 L R 21 Cal 70, Gossain v Ishri, 1 L R 21 Cal 844

⁴ Byjnath v Seetul, 10 W R. (F B) 66, Munjina v Collector, 12 W R 311, Thakoor v Collector, 13 W. R 336, Lala Mobaruk v. Secretary, 1 L R 11 Cal 200

⁵ Act XI of 1859, Sec 33.

VII of 1868, every certificate of sale issued under Act VI of 1859 "shall be conclusive evidence in favour of such purchaser and of every person claiming under him that all notices in or by this Act or by the said Act XI of 1859 required to be served or posted have been duly served and posted and the title of any person who may have obtained any such certificate shall not be impeached or affected by reason of any omission, informality, or irregularity as regards the serving or posting of any notice in the proceeding under which the sale was had at which such person may have purchased." The rule of law here laid down confines the inquiry merely to the ground of nullity *i.e.* illegality and not mere irregularity,¹ the sale not being under the provisions of the said Acts. Unless the suit is brought with the utmost expedition before the issuing of the certificate of sale, and unless the issuing of it by the Collector is stayed by temporary injunction under the provisions of the Code of Civil Procedure the grounds for interference by civil courts are very narrow. In *Lala Mobarik Lal v The Secretary of State for India in Council*² the majority of the Full Bench of the Calcutta High Court held that non-compliance with the provisions of section 6 of Act VI of 1859 was not a mere irregularity and was not one of those errors in procedure which was intended to be cured by section 8 of Bengal Act VII of 1868. But the decision of the Privy Council in the case of *Gorindlal Roy v Ram Janam Misser*³ has thrown considerable doubt as to the correctness of the view taken by the High Court.

The title of the purchaser dates from the day after that fixed for the last day of payment⁴ and not from

Purchaser's
title

¹ *Thakoor v Collector* 13 W. R. 33

² 11 L. R. 11 Cal. 200. See also *Bank of Bengal v. Jindal* 11 L. R. 2 Cal. 271. *11 C. L. R. 476*

³ 11 L. R. 21 Cal. 20, 11 L. R. 20 I. A. 103

⁴ AR VI of 1852. See 20 A. 454 A.

the day of the purchase or confirmation of the sale. The purchaser is also liable for instalments of revenue that have fallen due from that day.¹ The notices under section 7 of Act XI of 1859 prohibit payment of rent to the defaulter, the principle being that his right ceases with the default.

Provision is made in the Act against *benami* purchases, no suit for possession being maintainable against a certified purchaser on the ground of his being a *benamidar*.² This provision is very similar to the provision contained in section 317 of the Code of Civil Procedure,³ but the plea under this section is not allowed unless the case comes strictly within its words.⁴ There is, however, no bar to any of the defaulters purchasing the estate, though he himself has failed to pay his share of the revenue,⁵ but the sale does not avoid incumbrances.⁶

Benami purchases

Section 31 of the Act provides for the distribution of the surplus sale-proceeds. It is made payable to the recorded proprietor or proprietors or his or their heirs or representatives, in shares proportioned to the recorded interest, and if there is no record of shares, the aggregate sum is payable to the whole body of proprietors. The mortgagee has the right to recover his money from the surplus sale-proceeds,⁷ when mortgaged lands are sold for arrears of Government revenue which remained unpaid not through his default. An assignee

Distribution of sale-proceeds

¹ Act XI of 1859, Sec 30, *Wazeer v Fazloonnissa*, W R (1864) 373, *Khema v Nund*, 4 W R 75.

² Act XI of 1859, Sec 36; *Jadub v Ramlochun*, 5 W R. 56, the same case on review, 19 W R 189, *Johur v Brindabun*, 14 W R 10, *Chundra v Ram*, 1 L R 12 Cal 302, *Brindabun v Ram*, 1 L R 21 Cal 375. See also *Biswanath v Moran*, W R (1864) 353.

³ Act XIV of 1882. Compare Act VIII of 1859, Sec 260.

⁴ *Buhuns v Buhoree*, 10 B L R 159, *sc*, 14 M I A 496, *Lucky v Kali*, L R 2 I A 154.

⁵ Act XI of 1859, Sec 53, *Mahomed v Leicester*, 7 B L R, Ap, 52.

⁶ *Mahomed v Pearee*, 16 W R 136.

⁷ Act IV of 1882, Sec 73; *Heere v. Janaki*, 16 W R 222.

of recorded proprietors is not their representative under the Act¹ The Land Registration Act of 1876 has made registration of the names of proprietors and their respective shares compulsory² No difficulty can arise under the present law unless death or alienation, very shortly before or after the sale or before payment, brings in complications If the amount is attached under a decree of a civil court or by the Collector himself under the Public Demands Recovery Act no payment can be made by the Collector himself without compliance with the ordinary procedure

Limitation in suits for payment of surplus sale-proceeds.

The amount remains in deposit with the Collector until it is paid out and according to a recent Full Bench decision of the Calcutta High Court³ the period of limitation as against the Secretary of State for India, is six years under article 170 of Schedule II of Act XV of 1877 Pigot, J differed from the majority of the Court and was of opinion that the Collector held as trustee and under section 10 of the Limitation Act he was bound to pay the amount on demand

* Laws of succession and the necessity of registration of names and partition

The ordinary laws of succession amongst Hindus and Mahomedans⁴ are applicable to these permanently settled estates except where long established custom or family usage (*kulachar*) such as is provided for in Regulation X of 1800 is found to exist⁵ There being in India no territorial law the succession is in all cases governed by the personal law of the holder Holders of estates have free power of alienation not only of the whole but also of portions and fractional parts It was

¹ Secretary v. M. Raju 1 L.R. 11 Cal 312

² Corn. H. v. Oodoy 8 W.R. 321 Noy. 1889 31 L.R. 11 W.R. 205

See also Doorg v. Sheo 1 L.R. 18 C. 1 191 1 Apr. 1879

³ Secretary v. C. v. 1 L.R. 22 Cal 31 See the Secret. v. M. Raju 1 L.R. 11 Cal 312

⁴ Reg. XI of 1879

⁵ R. v. Deolai R. v. 2 Noy. 1889 31 L.R. 11 W.R. 205 22 Johar's 12 M. 1 A. 1

therefore, absolutely necessary to make rules for the recognition of the claims and protection of the interest of persons who have, by inheritance or purchase, right to estates or parts of estates, and also for the partition of estates amongst co-owners. One of the objects for enacting Act XI of 1859 is stated in the preamble to be "the expediency of affording sharers easy means of protecting their shares from sale by reason of the default of their co-sharers."

Regulation XLVIII of 1793 laid down rules for the registration in the Collectorate of the names of proprietors of estates. This Regulation was followed by Regulation XV of 1797.¹ The registers were called *quinquennial*, as they were required to be prepared every five years. These registers are public documents within the meaning of sections 35 and 74 of the Indian Evidence Act.² The Registration Regulation of 1800 made further provisions,³ but the law as to registration of names in the Collectorate was not strictly enforced until the passing of the Bengal Land Registration Act (VII of 1876).⁴ Under this Act, 'A' is the general Register kept by Collectors of revenue-paying lands, and the names and addresses of proprietors are required to be kept in it.⁴ Intermediate Registers are also required to be kept for noting changes affecting entries, and part I refers to revenue-paying lands. Sections 38 and 42 of the Act make registration of the names of proprietors or joint-proprietors in possession of estates compulsory, fines being imposed for non compliance with the provisions of the Act, and there being a further penalty under section 78 of the Act, as the right to sue under-tenants and raiyats for rent is taken away on failure to

Registration
of names

¹ Reg. XV of 1797, Sec. 2

² *Kasi v. Noor*, S. D. 1849, p. 113, *Sreemutty Oodoy v. Bishonath*, 7 W. R. 14. But see *Saraswati v. Dhanpat*, I. L. R. 9 Cal. 431.

³ Reg. VIII of 1800, Sec. 21

⁴ Act VII (B. C.) 1876, Sec. 8

procure registration ¹* After the registration of the name of a proprietor under Bengal Act VII of 1876 has been completed the person whose name is registered may get a mutation of name in the register of *toujies* or revenue-paying estates in the Collectorate, and he thus becomes a recorded proprietor or a recorded sharer of an estate. Copies of these registers are admissible in evidence ².

Separation of shares.

A recorded sharer of a joint estate, desiring to pay his share of the Government revenue separately may get a separate account opened and the separate liability of such recorded sharer commences from the opening of such separate account ³. This rule applies also to holders of shares consisting of specific portions of the lands of an estate ⁴. The power of the Collector however, to open a separate account is restricted to cases where no objection is made by any other recorded proprietor. On an objection being made, the Collector is to refer the parties to the Civil Court ⁵.

Sales of separated shares.

The rules for the realization of revenue and for sale on non-payment thereof applicable to entire estates are also applicable to separated shares except that if the highest offer for the share exposed to sale be not equal to the amount of arrears due the Collector is required to give notice to the other sharers and if the amount due be not paid within ten days from the date of notice the entire estate may be sold after due publica-

Surya v. H. Kant I L R 16 Cal. 66; Dhorendhar Wajidpuria, I L R 16 Cal. 705 (1).

An owner of a share of a recorded proprietor is also bound to have his name registered before he gets a share in the estate. I L R 22 Cal. 458.

* See S. C. v. I L R 22 Cal. 92. See also R. v. J. I L R 8 Cal. 133. See also D. v. I L R 9 Cal. 431 & 11 Cal. 122.

Att. N. I. 1875 Sec. 19 R. 10. See D. v. W. R. 131.

Att. N. I. 1875 Sec. 11 C. 10. See D. v. W. R. 117.

Att. N. I. 1875 Sec. 12.

tion of notice The payment by a sharer, if made within ten days, has the effect of a purchase of the share in arrear, and such sharer may obtain a certificate of sale and delivery of possession under the Act A purchase thus made by a co-sharer is considered to have all the incidents of a sale under the Act, and it is subject to the same rules as to annulment of the sale and avoidance of encumbrances as ordinary sales of shares under the Act¹

The partition of estates by the Collector gives the sharers complete security, and the shares carved out by such partition have all the advantages of a parent estate, each partitioned share being recognised as an estate It is supposed that complete security for the realization of Government revenue requires that partition should be effected by a revenue-officer or, at least, that he should sanction the same The civil courts in the country have the power to pass decrees for partition after ascertainment of the shares of the parties interested,² but actual partition cannot be effected except by the Collector³ A private partition may be binding on the parties but not the Government, unless special sanction of the Collector is obtained. But if the division of the lands of any estate has been made by private arrangement, and each proprietor is in possession of separate lands in accordance with such arrangement, the Collector has no power to interfere at the instance of any one or more of the co-sharers⁴ A joint application must in such a case be made by all the co-sharers⁵ The jurisdiction

✓
Partition of
estates

¹ A& XI of 1859, Secs 14 and 53, *Gossain v Ishri*, 1 L R 21 Cal 844

² A& VIII (B C) of 1876, Sec 29, A& XIV of 1882, Secs 265 and 396, *Mohsun v Nuzum*, 6 W R 15, *Ramjoy v Ram Runjun*, 8 C L R 367

³ *Spencer v Puhul*, 15 W R 471, *Meherban v Behari*, 1 L R 23 Cal 679

⁴ A& VIII of 1876, Sec 12 *Bujrungee v Syud*, 5 W R 186

⁵ A& VIII (B C) of 1876, Secs 101, 105, *Joymonee v Imam*, 13 W R 471

of the Collector is not, however, excluded unless it be shown that separate possession of the lands is due to a special arrangement effecting partition and unless all the lands are held in severalty and no part is held jointly.¹ The mere possession of specific portions of land is not enough to oust the jurisdiction of the Collector. Of course, a presumption of arrangement may be made from long possession. But as regards lands originally waste, the mere occupation and cultivation by co-sharers separately may rebut the presumption arising from long possession. Extreme inequality of lands disproportionate to the share in the possession of each co-sharer, may also rebut such presumption.

Persons not
entitled to
partition.

No person having a proprietary interest in an estate for a term of his life only is entitled to claim a partition by the Collector.² It should be remembered that it is optional with the Collector according to the circumstances of each case to allow a partition to the holder of a life estate. A Hindu widow and other Hindu females holding under the same sort of right as that of a Hindu widow are not however tenants for life they are entitled to claim partition by the Collector.³ The Civil Courts may exercise their discretion in any suit for partition by a female having only a Hindu widow's estate though the better rule seems to be that partition should always be allowed.

Estates not
partible by
Collector

There can be no partition by the Collector where the separate estate of any of the proprietors would on partition be liable for an annual amount of land revenue not exceeding one rupee.⁴ This rule prevents in most cases the partition of small estates by the Collector, but perhaps a Civil Court may decree partition though

¹ AIR VIII (PC) of 1874 See 12 Dunge & Rids 2 W R 311
107 & Lall L R 8 Cal 127 or 10 C L R 114. See p. 1 L L L R
16 Cal 117 See 10 Ind & S L R 2 C L R 243.

² AIR VIII (PC) of 1874 See 12

³ Mohade 2 & H Ind 15 C L R 315 or 1 L R 2 C L 244

AIR VIII (PC) of 1874 See 12

the apportionment of revenue will not be binding on the Collector¹

If the Revenue officers refuse on insufficient grounds to direct the partition of an estate, any party aggrieved may sue in a civil court for a decree for partition² A party may also, before applying to the Collector, ask a civil court to declare the rights of the several co-sharers and to direct the Collector to effect a partition³ But no civil court can direct a partition by the Collector, if the revenue payable by any sharer for his share be less than one rupee On a decree by the civil court for partition, the successful plaintiff may apply to the Collector for actual partition A civil court may also, during the pendency of partition proceedings before the revenue authorities, declare the shares of the parties,⁴ and even after partition declare the respective shares of the parties which may be different from their recorded shares in the partition proceedings, but cannot, after a partition already made, modify the allotment made by the revenue authorities⁵

Jurisdiction
of Civil
Courts

There is now a conflict of cases as to the jurisdiction of civil courts in the matter of the actual partition of estates by metes and bounds Division of the lands of an estate by metes and bounds, accompanied by a proportionate division of the revenue binding on the Government, is

Conflict of
cases

¹ *Ranee v Kooer*, 20 W R 182, *Kalee v Ram*, 24 W R 243, *Chunder v Hur*, 1 L R 7 Cal 153, *Ajoodhya v Collector*, 1 L R 9 Cal 419, *Zahrin v Gowri*, 1 L R 15 Cal 198, *Debi v Sheo*, 1 L R 16 Cal 203 See also *Doorga v Mohesh*, 15 W R 242, *Spencer v Puhul*, 15 W R 471 *Rutten v Brojo*, 22 W R 11

² Aft VIII (B C) of 1876, Sec 29, Aft XIV of 1882, Sec 265, *Secretary v Nundun*, 1 L R 10 Cal 435

³ Aft VIII (B C) of 1876, Sec 26, *Dewan v Jebunnissa*, 16 W R 34; *Mussamat v Woman*, 3 C L R 453, *Meherban v Behari*, 1 L R 23 Cal 679

⁴ *Muddun v Kartick*, 14 W R 335, *Sheo v Sunkur*, 16 W R 190, *Oodoy v Paluck*, 16 W R 271

⁵ *Spencer v Puhul*, 15 W R 471, *Sharat v Hur*, 1 L R 4 Cal 510.

complete partition and the revenue authorities have exclusive jurisdiction to effect such *complete* partition. But partition may be *incomplete* in two ways,—there may be a division of the lands and a proportionate division of the revenue without the sanction of and recognition by the revenue authorities the liabilities of the sharers being determined as amongst themselves, and there may be a division of the lands only, the liability as to revenue remaining joint. Have civil courts in the country jurisdiction as to either of the latter modes of *incomplete* partition? The question must be settled either by a Full Bench of the High Court or by the Legislature.

Jurisdiction
of Collec-
tors.

The first important Regulation as to the procedure to be followed in the partition of estates by the Collector was XX of 1814. The present Act VIII (B.C.) of 1876 by which Regulation XX has been repealed is somewhat elaborate and removes many of the difficulties that must necessarily attend a partition by the Collector. I understand that it is in the contemplation of the local Government to introduce a bill to amend Act VIII (B.C.) of 1876 with a view to simplify the procedure as to partition by the revenue authorities. It seems to me however to be an anomaly—a survival—that while the civil courts in Bengal have exclusive jurisdiction in the partition of all kinds of immovable properties there should be special courts and a special procedure for the partition of revenue paying estates. The existence of the Estates Partition Act in the statute book of Bengal indicates a want of confidence of the State in its civil courts where its own interest is concerned. There is no reason to suppose that the Government would suffer if the apportionment of revenue be left to be determined by the judicial procedure adopted in civil courts. The exclusive jurisdiction of the Collector also requires as we have seen to be supplemented by the interference of civil courts. Various questions which can only be determined by civil courts do frequently arise on an application for partition and

during the course of partition-proceedings, and litigants in this country are unnecessarily harassed by being compelled to have recourse both to the Revenue officers and Civil judges, when one and the same tribunal may, by the framing of proper rules of law and procedure, be made to perform the same duties. A partition by a Collector is necessarily one which cannot be, and is really not, *equitable* in the sense in which an English lawyer would use the word. If there are four estates belonging to two proprietors jointly, the Collector would require four separate applications, and there must be four separate proceedings, and each estate must be divided into equal moieties. But if the civil courts have jurisdiction, they may allot two of these estates to one of the joint proprietors, two others to another, equalizing the partition by payment of owelty, and all this may be done in a single suit. They may also allot two of these estates to one, a third to another, and divide the fourth between the two. The complications which arise from the existence of subordinate tenures, the holders of which have not the right to be heard by the revenue authorities, may also be avoided by the civil courts being allowed jurisdiction. It is now freely admitted, and, in fact, it is pointed out as a gross mistake of the Permanent Settlement of Bengal, that profits of holders of estates, are nearly ten times the revenue which the Government realizes from them. Financiers have, therefore, no reason to suppose that the realization of the land tax to the last copper piece will be jeopardized by small inequalities in value and dimension of land, resulting from a partition by a civil court. The proverbial delay and cost in *Butwara* proceedings, even with the procedure laid down by Bengal Act VII of 1876, which has repealed the Regulation of 1814, may also be avoided to a considerable extent by partition by commissioners appointed under the Code of Civil Procedure.

I would not detain you with a recital of the proced-

* Procedure as to partition.

ure for partition of estates. Part of the duty to be performed in these proceedings may be done by the Deputy Collectors others and the more weighty ones are left to the Collector himself and only the *Collector* may declare an estate to be under partition¹ In most matters an appeal lies to the Commissioner of Revenue and in some to the Board of Revenue and the Board may always exercise its revisional powers. Partition by the Collector is usually the separation of the share of the applicant by allotting to him a proportionate share of the land, and not the separate allotment to all the sharers of their respective shares unless the other sharers also ask for partition of their shares. The parties may at any time, cause proceedings to be stayed by consent² and the Commissioner may also stay proceedings, and if need be, quash them³ Confirmation of partition by the Commissioner is necessary to give it validity⁴ But the Lieutenant Governor may within twelve years set aside any allotment and direct a fresh allotment if it appears that, through fraud or error the land revenue assessed on any share is not in proportion to the lands allotted⁵ Each separate estate formed by partition bears a separate number in the revenue roll of the district and is separately liable for the land revenue assessed upon it⁶

* Estates exempted from sale for arrears

Estates are exempted from liability to sale under the *sale laws* in cases of disqualified proprietors and in cases of attachment by revenue authorities or management by a revenue officer. The properties of minors, idiots, lunatics and disqualified proprietors require peculiarly the protection of the sovereign. The Hindu law recognised the king as the supreme guardian of the property of all minors⁷ This is in accordance with the law

Act VIII (DC) of 1873 Sec 23. Act VIII (DC) of 1874 Sec 23.

² Act VIII (DC) of 1874 Sec 24. Act VIII (DC) of 1874 Sec 24.

Act VIII (DC) of 1874 Sec 25. Act VIII (DC) of 1874 Sec 25.

Act VIII (DC) of 1874 Sec 26. Act VIII (DC) of 1874 Sec 26.

Act VIII (DC) of 1874 Sec 27.

in all civilized countries, it being a prerogative of the Crown, flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector¹ The Mahomedan law also enjoined the Quazî to exercise vigilant supervision over guardians in the management of their wards' properties,² as he is the representative of the government of the sultan In England, this jurisdiction was exercised by the Court of Chancery Provision was made by the Regulation Code of 1793³ for the protection of the estates of minors and other disqualified proprietors—idiots, lunatics and others incapable of managing estates on account of natural defects or infirmities Females incapable of managing their estates were also declared to be disqualified proprietors⁴ Regulation X of 1793 provided for the establishment of the Court of Wards, and made rules relative to disqualified landholders and their estates The Proclamation declaring the Decennial Settlement Permanent exempted the estates of disqualified proprietors from liability to sale for any arrears accruing during the period of their disqualification⁵ The sale-laws, passed from time to time, made similar provisions in favour of minors The sale-law of 1859 provided—"No estate shall be liable to sale for the recovery of arrears which have accrued during the period of its being under the management of the Court of Wards, and no estate, the sole property of a minor or minors and descended to him or them by the regular course of inheritance, duly notified to the Collector for the information of the Court of Wards, but of which the Court of Wards has not assumed the management under Regulation VI of 1822, shall be sold for arrears of

* Estates of minors &c exempted from revenue-sale

¹ Story's Equity Jurisprudence, Sec 1333

² Ameer Ali's Mahomedan Law, p 572

³ Reg VIII of 1793, Sec 21 ⁴ See Reg I of 1793, Sec 8, cl 5

⁵ Reg. XIV of 1793, Sec 48, Reg VI of 1822, Sec 4

revenue accruing subsequently to his or their succession to the same, until the minor or minors, or one of them, shall have attained the full age of eighteen years." The age of majority of infants under the Court of Wards and of those whose properties are under the management of civil courts is now twenty-one years.¹ The present Court of Wards Act is Bengal Act IX of 1879 as amended by Bengal Act III of 1881, and the present law relating to infants who are not under the Court of Wards is Act VIII of 1890. The protection from sale of estates belonging to minors as contained in section 17 of Act XI of 1859 is now given by section 4 of Bengal Act III of 1881 which has repealed the words of section 17 of Act XI of 1859 I have quoted above. The present law as to the liability of the estates of minors to sale for arrears may be thus summarised—(a) Every estate or a separated share of an estate is exempt from sale for arrears of revenue which have accrued while it has been in charge of the Court of Wards² but it may at any time be sold for such arrears if the Court of Wards certifies in writing, with its reasons, that the interest of the ward requires that it should be sold under the sale laws.³ (b)—All unpaid arrears of revenue accruing during the period of the management by the Court shall be a first charge upon the sale proceeds, if the estate or share of an estate be sold for any other cause than for such arrears of revenue and if any arrears remain due when the estate ceases to be under the charge of the Court the Collector may attach⁴ it for the arrears and incidental costs. c)—In case of minors not brought under the Court of Wards no estate the sole property of a minor or of two or more minors shall be sold for arrears of revenue

Act XI of 1859 Sec 17 Act IX of 1879 Sec 3
 Act IX (II C) of 1881 Sec 23 cl 1
 Act IX (II C) of 1881 Sec 23 5
 Act IX (II C) of 1881 Sec 23 cl 2

accruing subsequent to the succession, until the completion of the age of majority, if the Collector has been served with a written notice of the fact that the estate is the sole property of the minor or minors,¹ but such arrears shall be the first charge on the proceeds of the estate, if it is sold for any other cause during the minority, and the estate is also liable to be attached by the Collector.² Under the Court of Wards Act, the Board of Revenue is the Court of Wards,³ but the Collectors and the Commissioners do the actual work through managers appointed by the Court. The Revenue Officer is thus the payer as well as the receiver of revenue, and I think it is an anomaly for the same individual, who is the receiver as well as the payer of money, to sell the property of an infant under his custody for non payment of such money.

While on the subject of exemption from sale for arrears of revenue, I may add that, under the unrepealed provisions of section 17 of Act XI of 1859, no estate held under attachment by the Revenue authorities, otherwise than by order of a judicial authority, is liable to sale for arrears accruing whilst it is so held under attachment, and similarly an estate held under attachment or managed by a Revenue Officer in pursuance of an order of a judicial authority is not liable to be sold until after the end of the year. But the mere issuing of a certificate of attachment does not operate as an attachment by the Collector.

Estates under
management
of Revenue
Officers

Besides the payment of revenue and cesses by the holders of permanently settled estates, there are duties of minor importance which the Government has imposed on them. The liability to supply provisions to the army is one of these. Regulation XI of 1806 made provision for compelling landholders and farmers of estates to supply,

Liability to
supply pro
visions &c to
the army

¹ Act IX (B C) of 1879, Secs 24 and 25

² Act IX (B C) of 1879, Sec 24

³ Act IX (B C) of 1879, Sec 5

for troops passing through their estates, the required provisions, boats and coolies Regulation VI of 1825 made further provisions for compelling zemindars to provide supplies, boats &c, the penalty for default being fine not exceeding one thousand sicca rupees ¹

Liability to
give informa-
tion of certain
offences.

The duty of giving information of the commission of certain offences within the ambit of the estate, especially offences regarding the manufacture of salt, offences with respect to the excise law and certain serious offences under the Indian Penal Code has been imposed upon zemindars as a matter of necessity. By the Settlement Regulations² the zemindars were disburdened of their police and magisterial duties. But the duty of sending reports to police officers and magistrates has continued to be on them and the native officers of landholders are also responsible. These provisions are now embodied in section 154 of Act XLV of 1860 and section 45 of Act V of 1882.

Compensa-
tion on acqui-
sition of lands
for public
purposes.

On the acquisition of lands which are revenue paying the basis for calculating the amount of compensation is the actual price for which the land subject to the burden of payment of land revenue would sell in the market. In determining the amount of compensation the Collector has to determine the exact amount of land revenue payable for the land the subject of acquisition. The procedure that should be followed by Collectors in ascertaining the amount of revenue payable for lands under acquisition is laid down in the rules promulgated by the Government of Bengal under section 59 of Act V of 1870³ and these rules have remained unaltered till the passing of Act I of 1894. The market value being determined after deduction made for Government revenue no question of apportionment can arise between the

¹ Reg VI of 1825 Sec 2

² Reg VI of 1810 Reg I of 1811 Sec 20 Reg III of 1810 Sec 41

³ Reg VIII of 1814 Reg III of 1831 Sec 2

Calcutta Gazette 25th July 1873 p 102

Government and the claimant for compensation. None of the Land Acquisition Acts laid down definite rules as to abatement of government-revenue, but the rules made under section 55 of the Act of 1894 (Act of 1870, Sec 59) have the force of law, if the sanction of the Governor-General in Council be obtained. Under the above rules, the Collector, after the determination of the amount of revenue payable in respect of the land acquired, should grant remission to that extent to the holder of the estate. But if the area of the land acquired does not exceed one twentieth of the area of the entire estate, and the claimant, the proprietor, declines to accept abatement of revenue, the Collector may pay an additional sum calculated at the same number of years' purchase of the government revenue as is the basis of calculation of the rest of the amount of compensation paid. When abatement is allowed, it has effect from the date of the possession taken by the Collector of the land acquired.

I shall now say a few words on the right known as *malikana*. It is an allowance for proprietary right to a person who was owner or proprietor. The rules making the Decennial Settlement Permanent directed that the proprietors, who might finally refuse to enter into engagements for the amount of revenue required of them, should be allowed *malikana*, in consideration of their proprietary rights, at the rate of ten per cent on the revenue, if the lands were let in farm. The amount of the *malikana* was payable by the farmer to the proprietor, in addition to the amount payable to the Government as revenue, in instalments according to the instalments of government-revenue. The Collectors were to realise the *malikana* in the same way as Government revenue, and the Government guaranteed the amount to the proprietors. In the event of the land being held *khas* by Government, the *malikana* was payable by the Collector at ten per cent on the net

is twelve years from the time when the money sued for becomes due¹

Notwithstanding the direction contained in section 46 of Regulation VIII of 1793 for the realization of malikana-allowance by the Collector from the farmers, suits for recovery of malikana are maintainable. The High Court at Calcutta at one time doubted whether such a suit would lie, having regard to the provisions of section 46 of the Regulation². But the express provisions in the later Limitation Acts contemplate such suits, and notwithstanding the doubt thrown out, such suits have always been allowed.

Suits for recovery of malikana

The relative duties and obligations of the joint holders of an estate deserve a few words. I have already given you a summary of the legislative enactments as to the rights of co-sharers of permanently settled estates in relation to Government. As between themselves, they have rights and obligations of complicated character, which it will be difficult to narrate in the compass of this lecture. I draw your attention only to what may be said *quasi*-contracts arising out of payment of government-revenue and similar other dues for the protection of the estate. The law is laid down in the Contract Act (IX of 1872)³. It was at one time understood that a co-sharer, paying into the Collectorate the amount of revenue due from another co-sharer for the protection of the estate and consequently of his own share also, was entitled to a charge⁴ on the share thus protected by him, and the case of *Nugender Chunder Ghose v Kaminee Dossee*,⁵ already cited, was considered as an authority for the proposition.

Contribution amongst co-owners of estates

¹ Act XV of 1877, Sch II, Art 132, Act IX of 1871, Sch II, Art 132

² *Bhuli v Mussamut*, 4 B L R 29

³ Act IX of 1872, Secs 69 and 70

⁴ *Nobin v Rup*, 1 L R 9 Cal 377, *sc*, 11 C L R 499, *sc*, 11 M I A 452

⁵ 8 W R., P C, 17, *sc*, 11 M I A 241

But the earlier decisions¹, based on the dictum of the Judicial Committee, have been overruled by the Full Bench decision in the case of *Kinn Ram Das v. Mozaffer Hosain and others*². The rule laid down in this case by the majority of the Full Bench that there is no lien created by the advances made by a co-sharer, is in conflict with the decision of some of the other High Courts on the same subject. It seems to be extremely hard that a co-sharer should have no security for the advances made by him which have saved the property from sale. The case of a mortgagee is distinctly provided for in the Sale Laws³ and the Transfer of Property Act⁴. The Bengal Tenancy Act,⁵ which contains the latest ideas of our lawgivers on the rights of co-sharers gives to the advances made by a co-sharer priority over every other charge. The attention of the Legislative Council has been drawn to the mischief caused by the exposition of the law by the majority of the judges of the Calcutta and the Allahabad High Courts, and I hope remedy will soon be provided for.

¹ Common
managers.

Disputes between co-owners very frequently cause inconvenience to the public and injury to private rights. In 1812 provision had to be made to prevent the mischief arising out of such disputes and the Revenue authorities or any one of the co-owners or other persons interested in an estate could apply to the District Judge having jurisdiction for the appointment of a common manager and to remove such manager when appointed. Regulation V of 1827 empowered the District Judge to

¹ *Syed Fozel v. Muddusomone* 22 B. L. R. 155. 11 J. B. P. 411; *Nolin v. Rup* 1 L. R. 9 Cal. 37.

² 1 L. R. 14 Cal. 807. See also *A. v. Hail* 1 L. R. 11 B. 313; *Guth v. Sult* 1 L. R. 14 A. 273; *Har v. K.* 1 L. R. 4 C. 41—*in re Lathie* L. R. 23 C. 2 D. 311.

³ Act XI of 1852 Sec. 9. *M. B. v. S.* 22 B. 277.

⁴ Act VIII of 1882 Sec. 45. See 172.

⁵ Act V of 1912 Sec. 26. See *Chatterjee v. Chatterjee* 22 B. 179; *Ramgopal v. Gopala* 22 B. 211.

direct the Collector to hold an estate under his management through a manager. Frequent disputes amongst co-owners required the passing of definite rules for the appointment and removal of common managers, and the Bengal Tenancy Act (VIII of 1885) accordingly made provision for the appointment of a common manager "on the application of the Collector or of any person interested in the estate in case of inconvenience to the public, or on the application of a recorded co owner in case of injury to private rights" ¹ The District Judge is, in such cases, directed to issue notices upon the co owners to shew cause why a common manager should not be appointed, and on their non-appearance or failure to shew cause, or on their failure to appoint a common manager within the time that may be fixed for the purpose, the District Judge has the power to appoint a common manager or to place the estate in the hands of the Court of Wards, if the Court consents to accept the charge. The District Judge has also the power to restore the management to the co owners, if he be satisfied that the management will be conducted by them without inconvenience to the public or injury to private rights ² The order of a District Judge for the appointment of a common manager is not appealable ³ to the High Court as a decree. But the High Court has the power of revision under section 622 of the Code of Civil Procedure ⁴

Various questions may and do constantly arise between the proprietors of different estates, many of which are highly complex. Survey and demarcation of estates are fertile sources of dispute. Alluvial accretions and reformations in site are constant sources of

¹ Act VIII (B C) of 1885, Secs 93 to 96

² Act VIII (B C) of 1885, Sec 99

³ *Hossain v Mutook*, I. L. R. 14 Cal. 312, *Abdul v Krishna*, I L R 20 Cal 704.

⁴ *Ganoda v Prabhabati*, I L R 20 Cal 881

litigation in the alluvial delta of the Gaoges. It will be impossible within the limits of these lectures to deal with the various ramifications of the law with reference to these matters.

Taluqs

I shall close this lecture with a few words on *independent taluqs*. At the time of the Decennial Settlement of the Bengal provinces there was a large number of land holders known as *taluqdars*, and their holdings were known as *taluqs*¹. The word *talug* is Arabic in origin and means something haoghog or dependent². The term is applied to various intermediate holdings differing in their incidents, but in Bengal it is more frequently used with reference to lands held under zemindars or lands originally carved out of zemindaries.

Independent taluqs are estates.

The Settlement and Resumption Regulations of the Bengal code divided the then existing *talugs* into two classes and called them either independent (*malukuri* or *khariji*) or dependent (*malukuri shikmi* or *shamlat*). We have already seen³ that the Government recognised the *independent taluqdars* in the Decennial and Permanent Settlements as actual proprietors of land, and they were allowed to enter into direct engagements at fixed sums of revenue payable in perpetuity into the Collector's treasury⁴. These taluqs as well as those subsequently created under the rules laid down in the Resumption Regulations to which I have already referred⁵ have the same incidents of law as *zemindaries*, and the taluqdars have the same rights and obligations in relation to the State. Regulation VIII of 1833 laid down distinct rules for the guidance of Collectors for separate settlement with independent taluqdars⁶. A

¹ For the origin and history of the taluqs see Tappin's *History of Bengal* for 1842, pp. 117-118 and *Land Revenue* by Mr. P. B. Powell p. 273.

² Introduction to the Bengal Code by C. D. F. p. 22.

³ A. 10 p. 46.

⁴ Act 97 of 1833.

⁵ Reg. VIII of 1833, Sec. 12, 13.

⁶ Reg. I of 1833, Sec. 11.

large number of taluqs was thus separated and recognised as *estates* before the year 1802. In the year 1801, a Regulation was passed to fix a period for applications for separation of taluqs as *independent*, and it was laid down "that all taluqdars who might deem their lands entitled to be separated from the zemindaries which included them must make their applications within one year from the 15th January 1801, the date of the passing of the Regulation, otherwise the claim to separation would be barred"¹ This law has put a stop to the recognition of independent taluqs as *estates*, except those that have been created under the rules laid down in Regulations XIX and XXXVII of 1793 and II of 1819.

The distinction between independent and dependent taluqs was at one time of considerable importance, but the sections of Regulation VIII of 1793 dealing with them have now been repealed as obsolete²

¹ Reg VIII of 1793, Secs 10, 11

² Repealing Act XVI of 1874

LECTURE V

PERMANENT TENURES

(TALUQS)

Dependent
taluqs

Between the zemindars and persons actually occupying the lands of an estate there were at the dates of the Decennial and the Permanent Settlements a large number of intermediate holders who paid to the former fixed sums in perpetuity and their number has since largely increased. Most of these tenures are known by the name of *taluqs*. Those existing at the Decennial Settlement and not recognised as estates (*independent taluqs*) and those created by proprietors of estates after the date of the Settlement the revenue payable for them not being separated and separately recorded in the Official Registers of Collectors as estates or share of estates are said to be *dependent*¹ and the holders of the taluqs are called *taluqdars*.

I propose to deal first with the *taluqs* existing at the time of the Decennial Settlement. They may be classed—(1) Taluqs for which the revenue was paid through zemindars and the title deeds in respect of which contained a stipulation that it should be so paid.² (2) Taluqs held under grants from zemindars which did not expressly transfer the property in the soil but operated simply as leases on terms of payment of rent and other conditions. (3) *Jungle buri* taluqs held under permanent leases on conditions of clearance of jungle lands and payment of fixed amounts of revenue after a fixed rent free period and (4) Taluqs which might have been recorded as *independent* but for

which applications to the Collector were not made within one year from the passing of Regulation I of 1801¹

Regulation VIII of 1793 speaks of two classes of dependent taluqs existing at the date of the Permanent Settlement—those of which the rent was capable of being enhanced, and those of which the rent was not enhanceable. If there was a grant to hold in perpetuity at fixed rent, and payment had been made of such fixed rent for more than twelve years before the Permanent Settlement, neither the grantor nor his heirs, nor even the Government, could enhance the rent. But if the grantee had held on payment of fixed rent for less than twelve years, the Government or any proprietor other than the grantor or his heirs could demand increased assessment². The presumption was generally in favour of the taluqdars, as soon as it was proved that the taluq had existed from before the Decennial Settlement³.

✕ Regulation
VIII of 1793,
Sec 49

Section 51 of Regulation VIII of 1793 declared—"No zemindar or other actual proprietor of land shall demand an increase from the taluqdars dependent on him, although he should himself be subject to the payment of an increase of jumma to Government, except upon proof that he is entitled so to do, either by the special custom of the district, or by the conditions under which the taluqdar holds his tenure, or that the taluqdar, by receiving abatements from his jumma, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it"⁴. Section 48 of the Regulation required proprietors of estates to enter into engagements with these taluqdars, "provided the taluqdars

✕ Regulation
VIII of 1793,
Sections 48
and 51

¹ Reg I of 1804, Sec 24

² Reg VIII of 1793, Sec 49

³ *Dayamony v Nuordkumar*, 2 Hay 220, *Radheeka v Rammohun*, 1 W R 367, *Panioty v Juggut*, 9 W R 379, *Radhika v Bama* 4 B L R (P C) 8, *sc*, 13 W R (P C) 11, *sc*, 13 M I A 248; *Hurro v Gobind*, 23 W., R 352

⁴ See Act VIII of 1885, Sec 6

* Rights of
auction-pur-
chasers at
sales for
arrears

agreed to such revenue progressive or otherwise as the proprietor might be entitled to demand from them'. But this power of demanding increase could only be exercised subject to the provisions of Sections 49 and 51 of the Regulation. Section 7 of Regulation XLIV of 1793 made the matter clearer by enacting that even auction purchasers at sales for arrears of government revenue under section 5 of the Regulation had not the "authority to assess increased rent upon the lands of such dependent taluqdars as were exempted from any increase of assessment at the date of the Decennial Settlement by virtue of the prohibition contained in clause 1 section 51 of Regulation VIII of 1793. The revenue payable by such dependent taluqdars was declared fixed for ever and their lands were accordingly to be rated at such fixed assessment in all divisions of the estate in which their lands were included." Their position was not to be affected even if no engagements such as those contemplated in section 48 of Regulation VIII of 1793, were entered into and even if no engagements were recorded in the Collectorate.

* Bama Soondery
vs Radhika
Chowdhra

In the leading case of *Bama Soondery Dassiah v Radhika Chowdhra and others* the Judicial Committee of the Privy Council have thus summarised the effect of the provisions of the Regulations relating to dependent taluqs—*a*) A zemindar holding under the Perpetual Settlement has the right from time to time to raise the rents of all rent paying lands within his zemindari according to the pergunah or current rates unless he is precluded from the exercise of that right either by contract binding on him or unless the lands in question can be brought within one

Harroath v B. I. 31 R. 1793 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

of the exemptions recognized by Regulation VIII of 1793 (a). The burden of proving that the lands claimed are within the ambit of a dependent taluq and that the taluq existed at the Decennial Settlement is upon the taluqdar. (c) Section 51 of Regulation VIII of 1793 imposes upon the zemindar the burden of showing that he is entitled to raise the rate of rent either by special custom or by contract, or by reason of certain specified conduct on the part of the taluqdar.

The amount of evidence necessary to prove the existence of a dependent taluq at the date of the Decennial Settlement varies according to circumstances. Assertions made about its existence shortly before the Decennial Settlement have been considered to be good evidence¹. Neither does the non-mention in the Decennial or Quinquennial papers afford strong inference against its existence².

✕ Evidence to prove the existence of a taluq at the Decennial Settlement

✓ If, however, in a suit by an auction-purchaser for arrears of revenue, a taluqdar pleaded exemption from liability to enhancement on the grounds set forth in section 49 of Regulation VIII of 1793, *viz.*, that the taluq had been held at fixed and invariable rent for more than twelve years antecedent to the Permanent Settlement, or if he set up a contract valid under that section, the burden was on the taluqdar. The onus of proof varied according as the plea was set up either under section 49 or section 51 of the Regulation³.

✕ Onus probandi

The right to enhance the rent of a dependent taluq could be exercised only after notice⁴. Regulation V of 1812 laid down that no tenant would be liable to pay en-

✕ Notice of enhancement

✕¹ *Bama v Radhika*, 13 M I A 248, *Romesh v Modhoo*, 5 W R 252

✕² *Wise v Bhooban*, 10 M I A 165, *Rajah Nilmoney v Ram*, 21 W R 439

✕³ *Babu Gopal v Teluk*, 10 M I A 183, *Bama v Radhika*, 13 M I A 248

⁴ Reg V of 1812, Sec 9. *Nilmoney v Chunder*, 14 W R 251; *Nilmoney v Ram*, 21 W. R 439, *Srimati v Girish*, 7 B L.R App. 44.

hanced rent, though subject to enhancement under the subsisting Regulations unless a formal written notice had been served on such tenant on or before the month of *Faish*, notifying the specific rent to which he would be subject for the ensuing *Faish* or the current Bengali year. The notice must specify upon which of the grounds mentioned in section 51 of Regulation VIII of 1793 the enhancement was sought.¹

† Grounds of enhancement.

If the zemindar succeeded in showing that a dependent taluq lying within the ambit of his estate could not claim exemption from liability to enhancement and that the notice required by law had been duly served the grounds of enhancement could be taken into consideration. But if the plaintiff failed to prove due service of notice, or if the notice served did not comply with the requirements of section 51 of Regulation VIII of 1793 the court might grant a declaration that the taluq was liable to enhancement.² The special custom of the district mentioned in section 51 of Regulation VIII of 1793 referred to rents according to *pergana* rates or rates paid by similar taluqdars in the district and not those payable by cultivating rayats.³ If the rent paid by a taluqdar was less in rate than that paid by other taluqdars having the same status enhancement should be allowed provided that the lands were capable of affording an increase. It was however extremely difficult to prove special custom and the practical result has been that we have very few instances of enhancement of rent of dependent taluqs existing from before the Permanent Settlement.⁴ If the taluqdar had obtained the benefit of

¹ *Wheeler v. Masamoodjee* 13 W. R. 238; *see also* *Wheeler v. Masamoodjee* 13 W. R. 492. See also *Wheeler v. Masamoodjee* 13 W. R. 492. See 6.

² *Wheeler v. Masamoodjee* 13 W. R. 492.

³ *Wheeler v. Masamoodjee* 13 W. R. 492.

⁴ *Wheeler v. Masamoodjee* 13 W. R. 492. *Wheeler v. Masamoodjee* 13 W. R. 492. *Wheeler v. Masamoodjee* 13 W. R. 492. *Wheeler v. Masamoodjee* 13 W. R. 492.

a decrease of rent on the ground of diluvion, increase in area on account of reformation in site or accretion would be a very good reason for enhancement¹

* Taluqs existing from the date of the Permanent Settlement

The right conferred on these taluqdars by Regulation VIII of 1793 is statutory, and, as we have seen, auction-purchasers on sales for arrears of revenue are bound to respect it. Section 37 of Act XI of 1859 and section 12 of Bengal Act VII of 1868 gave permanency to tenures existing at the time of the Permanent Settlement as against auction purchasers for arrears of revenue of entire estates. If the rent has changed since that date, the tenure is only liable to enhancement, but there can be no ejectment. Such tenures are placed in the same category as dependent taluqs existing from before the settlement, the rent of which was enhanceable under certain circumstances. But tenures which have been held at fixed rents from the time of the Permanent Settlement were declared valid—both as regards permanency and fixity of rent—as against such auction-purchasers. Act X of 1859 supplemented the provisions in the Regulation-laws by enacting in section 15 — “No dependent taluqdar who, in the Provinces of Bengal, Behar and Orissa holds his taluq (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the Permanent Settlement, shall be liable to any enhancement of such rent, anything in section 51, Regulation VIII of 1793, or in any other law, to the contrary notwithstanding.” Section 16 of the Act enacted that a presumption should be made that the rent was not changed from the Permanent Settlement, if the taluqdar succeeded in proving uniform payment for twenty years before the commencement of the suit. The Act made no change in the law as to the rights of taluqdars under section 51 of Regulation VIII of 1793 with reference to the grounds

¹ Compare *Hem v Ashgur*, 1 L. R. 4 Cal 894

sections 15 and 16 of Act X of 1859.¹ The words "Permanent Settlement," occurring in the Bengal Tenancy Act, have been defined to mean the Permanent Settlement of Bengal, Behar and Orissa made in 1793.² These words were not defined in the previous Rent Acts, but they referred to the 22nd March 1793, the date of this Permanent Settlement of 1793.³ In any locality, where permanent settlement has not been effected, the taluqdar claiming permanency and fixity of rent must show that rent has not been changed since the 22nd March 1793. But no presumption can arise under the Bengal Tenancy Act, where the taluq is situated within the ambit of a temporarily settled estate, in which the Government has the right to raise its revenue on the occasion of every fresh settlement.⁴ The Government is not bound by the acts of the holder of land under a temporary settlement. Express recognition in the settlement proceedings by a Revenue officer, especially empowered by the local Government to make or confirm settlements, may be evidence of the right to hold a taluq exempt from enhancement.

But supposing that the rent of a taluq is fixed in perpetuity, can there be abatement or enhancement of rent on the ground of decrease or increase in area, when there is the absence of an express contract? The Bengal Tenancy Act has solved the disputed question of law by adding to the words of the Regulation the clause—"except on the ground of an alteration in the area of the tenure."⁵ This clause must be read along with section 52, subsection 1, clauses (a) and (b) of the Bengal Tenancy Act, which provide for alteration of rent in respect of

† Alteration of rent on alteration of area

¹ Act VIII of 1885, Sec 50, cls 1 and 2, *Suda v Nowruttun*, 16 W R 289

² Act VIII of 1885, Sec 3, cl 12.

† ³ *Dhunput v Gooman*, W R 1864, (Act X) 61; *Rajessurree v Shibnath*, 4 W R (Act X), 42

† ⁴ Act VIII of 1885, Sec 191 ⁵ Act VIII of 1885, Sec 50, cl. 1

alteration in area either by alluvion or diluvion or any other cause I shall revert to this ground of enhancement and deal with it at length later on

Changes
made by the
Bengal
Tenancy Act.

Section 51 of Regulation VIII of 1793 has been repealed by the Bengal Tenancy Act¹ but its provisions are embodied with a slight modification in section 6 of that Act. Sections 48 and 49 of the Regulation are still in force. Section 6 of the Bengal Tenancy Act restricts its operation to tenures existing from the time of the Permanent Settlement and consequently includes tenures or taluqs existing from before the Settlement while sections 48, 49 and 51 of the Regulation apply only to those that have existed from before. Practically the distinction is of little consequence as any claim based on the existence of a dependent taluq exactly from the date of the Settlement is seldom made and as we have already seen taluqs existing from before that date have generally acquired the status of permanent tenures at fixed rent. Let us however see wherein the Bengal Tenancy Act has modified the rules laid down in the Regulations—rules which are still in force in various parts of the Bengal Provinces. The Regulation speaks of the "special custom of the district" as one of the grounds of enhancement—the words in the Bengal Tenancy Act are "local custom." I do not think the change is material though the word *local* is wider in its import. Local may include a district, part of a district and even two or more districts. The other alteration is the insertion in clause (b) of section 6 of the Act, of the words "other than" on account of the diminution of the area of the tenure. This seems to imply that an abatement received by a taluqdar on account of decrease in area by diluvion or dispossession by title paramount would not make the tenure liable to enhancement except under section 52 of the Act which relates to increase in area by alluvion.

vion, encroachment by the tenant or other similar causes. The reduction of rent contemplated by section 6 must be one on account of the diminution of the rent-roll due to the productive power of land having decreased by reason of its being covered with sand, or to depopulation or causes of a similar nature.

The Bengal Tenancy Act has made a material alteration in procedure, by doing away with the necessity of notice upon taluqdars before the institution of a suit for enhancement. Section 154 of the Act now regulates the procedure in those districts in which that Act prevails.

X Notice of enhancement not necessary

Thus you see the rent of dependent taluqs existing at the date of the Permanent Settlement is not enhanceable in the following cases - (a) where the taluqdars have paid rent at fixed rate for at least twelve years before the Decennial Settlement, (b) where the taluqdars have paid rent uniformly at fixed rate from the time of the Permanent Settlement. The rent is enhanceable in all other cases, except where the parties are bound by the terms of the grants. The grounds of enhancement are those stated in Regulation VIII of 1793 and section 6 of the Bengal Tenancy Act. Ejectment is not allowed in any case.

X Summary

We now come to that class of dependent taluqs which have come into existence after the Permanent Settlement. The policy of the earlier Regulations was to prohibit proprietors of estates from "disposing of any dependent taluq to be held at the same or at any *jumma* for a term exceeding ten years" ¹. In those days such a provision was absolutely necessary for the protection of government-revenue, as ejectment was unknown, and cases of enhancement of rent extremely few. Leases for any term exceeding ten years were declared "null and void". This prohibition was repeated in 1795 and 1803 ², and it was declared that on sale

X Dependent taluqs created after the date of Permanent Settlement

¹ Reg XLIV of 1793, Sec. 2

² Reg L of 1795, Sec 2, Reg XLVII of 1803, Sec 2.

for arrears of government revenue all such leases would be cancelled.¹ But in 1812 it was deemed advisable to change the policy, and proprietors were declared competent to grant leases to dependent taluqdars on any terms most convenient to the parties even in perpetuity and reserving any amount of rent provided the interest the proprietors had in their estates authorised them to make such grants.² In the year 1819 all leases granted either before or after 1812 were declared valid notwithstanding that the rules in force before the passing of Regulation V of 1812 had prohibited the creation of such tenures.³

* *Putni taluqs*

Most of these taluqs created by the proprietors of estates after the Permanent Settlement were, by the terms of the grants permanent and hereditary with rent fixed for ever. The terms of the grants regulate the relation between the lessors and the lessees. A good many of these are known by the name of *putni taluqs*. A few go by other names. Others again are by the conditions of the grants, permanent hereditary and alienable though the rent is not fixed for ever—a condition being inserted in the leases for enhancement at customary or perganah rates or whenever there may be a general enhancement in the perganah or district. Some taluqs are held without written lease and custom or usage regulates their incidents. These last also are generally hereditary and alienable, though the rent may be enhanced. I propose to deal with them in the order I have mentioned them.

* Their incidents under Regulation VIII of 1819.

Putni taluqs have their origin in the estates of the Maharaja of Burdwan. The original meaning of the word *putni* seems to be, as Mr. Harington thinks, "a bill" and *putni taluq* means a dependent tenure settled

Reg. XLIII of 1803 Sec. 3

* Reg. V of 1812 Sec. 2 P. I. XLIII of 1812 Sec. 2

Reg. VIII of 1819 Sec. 2

Preamble to Reg. VIII of 1819

in perpetuity at fixed rent—The estates of the Maharaja of Burdwan were saved by the creation of these *putni taluqs* as the system afforded the only means of escape from the ruin of ancient families in Bengal, brought about by the Permanent Settlement. The assessment of land-revenue on the estates settled with the Burdwan Raj was very high. For easy and punctual realisation of rent, leases to middlemen in perpetuity and at fixed rent were granted to a large number of *intermediaries*, who were thus made proprietors in the same way as the Government had made the Maharaja of Burdwan a proprietor. Regulation VIII of 1819 placed on a legislative basis this system of *subinfeudation*. By degrees, the system extended to other zemindaries, and we have now a very large number of putni taluqs, especially in the districts of Hooghly, Burdwan, Bankura, Nuddea, and Purnea. The general characteristics of these tenures may be summed up in the words of the Regulation:—"The character of the tenure is that it is a *talug* created by the zemindar to be held at a rent fixed in perpetuity by the lessee and his heirs for ever, the tenant is called upon to furnish collateral security for the rent and for his conduct generally, or he is excused from this obligation at the zemindar's discretion, but even if the original tenant be excused, still in case of sales for arrears or other operations leading to the introduction of another tenant, such new incumbent has always, in practice, been liable to be so called upon at the option of the zemindar. In case of an arrear occurring, the tenure may be brought to sale by the zemindar, and if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be further answerable for the demand"¹ The Regulation admitted these Putni tenures to be saleable in execution

¹ Preamble to Reg. VIII of 1819

of ordinary money decrees and transferable by sale gift or mortgage and also admitted the right of the putnidars to create similar subordinate tenures called *dur putnis*¹. The putni taluqs were also declared not liable to be cancelled for arrears of rent. They were saleable for arrears the surplus sale proceeds after deducting the rent due to the zemindar being left to the credit of the defaulting putnidar.²

None of the Rent Acts—Act V of 1859 or Act VIII of 1885—has touched the provisions of the Putni Regulations: *c* Reg VIII of 1819 modified in matters not very material, by Regulation I of 1820 Regulation VI of 1832 Act VIII of 1835 Act XXV of 1850 Act VI of 1853 and Act VIII (B.C.) of 1865. The Bengal Tenancy Act, VIII of 1885 has expressly provided—Nothing in the Act shall affect any enactment relating to Putni tenures in so far as it relates to those tenures.³ In matters in which the Regulation as it now stand with the amendments, is silent, Act V of 1859 and the other Acts dealing with the incidents of the relationship of landlord and tenant furnish rules of substantive law and procedure but the express provisions of the Regulation have not been, in any way, affected by them.⁴ The zemindar has however, the additional right of bringing putni taluqs to sale under the ordinary procedure laid down for other kinds of tenures and the effect of such a sale is the same as to the right of the purchasers to avoid incumbrances and get other reliefs, as in sales under the Regulation.⁵

The summary procedure for biennial sales for

¹ Reg VIII of 1819 Sec 3 cl 3 & 4

² Reg VIII of 1819, Sec 3 cl 3

³ Act VIII of 1885 Sec 151 cl (d); *Cyasar v P. J. J. J.* 11 B. 17 Cal. 161

⁴ *Kidder v Kidder* 11 B. 1 Cal. 161; *Mohamed v P. J. J.* 11 B. 17 Cal. 161

⁵ *Bridges v Bridges* 21 B. 1 Cal. 161; *B. J. J.* 11 B. 17 Cal. 161

L.R. 1 A. 173

† Regulation VIII of 1819 not modified by the Rent Acts

arrears of rent, through the agency of the Collector of the District in which the putni taluq is situated, is the chief peculiarity noticeable in the Putni Regulations¹ Summary sales for arrears of revenue or rent are not allowed to any landlords, except the Government and the zemindars *qua* putni taluqs. The reference to months according to the Bengali Calendar, and not the Fashi or the Walaity, seems further to indicate that the Regulation itself was intended only for Bengal Proper, as it professedly referred to the Burdwan Raj. I am not aware of any instance of the application of the provisions of the Regulation, as to summary sales, in the Behar and the Orissa districts. The Maghee and Mulki eras correspond exactly in months and days with the Bengal era, and where these eras prevail, instances of sales under this Regulation are common.

✓
Summary
sales for
arrears

The first biennial or six-monthly sale, generally known as *sashmahi* sale, is the one that takes place for the arrears from Baisakh to Aswin. The application for sale may be made to the Collector² of the district in which the lands of the taluq or the greater part³ thereof are situated, on the first day of Kartik following, or if that be a close day, on the first open day of the month.

Sashmahi
Sale ✓

The second biennial sale, generally known as the *dwazdomahi* (twelve-monthly) sale, takes place for arrears remaining due at the end of the year (Chaitra), the zemindar being entitled to make the application on the first day of Baisakh or the first open day thereafter, the sale taking place in Jaisth following.

Dwazdomahi
Sale ✓

Only the recorded proprietor, or proprietors jointly, or a common manager whose name is duly reg-

Who may ap-
ply for sum-
mary sale

¹ Watson *v* Collector, 12 W R, P C, 43, *sc*, 3 B L R, P C, 48.

² Reg VII of 1832 Sec 16, cl 1, Act VI of 1853, Sec 1, Act VIII (B C) of 1865, Sec 3.

³ Act VI of 1853, Sec 1.

istered, may make the application. One of a number of co-proprietors or fractional co-sharers is not entitled to make the application unless the putni taluq is co-extensive with the interest of such fractional sharer or sharers. If A, B and C are joint owners of an estate, and if they have jointly created a putni taluq A alone is not entitled to apply for sale under the Regulation, either for the whole rent due from the putnidar, or for his own share only. But if A had created a putni of his own share he would be entitled alone to apply. Even if after the creation of the putni by a number of proprietors jointly the putnidar pays rent separately to each of the proprietors according to his share such a proprietor has not the right to apply. But if the several fractional proprietors and the putnidar enter into separate engagements by executing leases and counter parts the right of each proprietor may then be recognised by the Collector. The Regulation itself does not contemplate the case of any but owners of entire estates but it seems however, that the general law as to the rights of co-sharers is applicable. Registration of the proprietor's name under Act VII (B C) of 1876 is of course absolutely necessary to entitle him to any relief under the Regulation. The rule as to who may apply for sale under the Regulation must be taken to be the same as that in suits for arrears of rent where the tenure is sought to be made liable.

Notices of
sale

On the application to the Collector being admitted, three copies of the notice of sale are required to be served the first by being stuck up in some conspicuous part of the Collector's office or *cutchery* the second by being stuck up at the *gilder cutchery* of the *zemindar* himself and the third by publication of a copy or extra

Reg VIII of 1819 see Act 2 H 2 20 Act 11 of 1876
C 1 703

Reg VIII 1876 see Act 12 of 1876 12 of 1876
217 see 2 B L R 47

of such part of the notice as may apply to the individual case, at the cutchery or at the principal town or village upon the land of the defaulter ¹. This third notice is required to be served in the *mossul* by a single peon "who shall bring back the receipt of the defaulter or his *mossul* agent, or in the event of his inability to procure this, the signatures of three substantial persons ², residing in the neighbourhood, in attestation of the notice having been brought and published ³ on the spot". In case, however, the people of the village should object or refuse to sign their names in attestation, the peon is required to go to the cutchery of the nearest *moonsiff*, or if there should be no *moonsiff*, to the nearest *thana*, and there make an affidavit of due publication—certificate to which effect shall be signed and sealed by the officers there and delivered to the peon. The non-publication of any one of these notices is sufficient to vitiate any sale that may follow, even if there be no proof of substantial injury to the defaulter ⁴. The notice required to be stuck up at the cutchery of the defaulter may be published at the cutchery of an adjacent taluq belonging to him, when he has no cutchery on the taluq in arrear ⁵. A place where the zemindar's agent usually transacts business, though it is not a regular cutchery, may, in the eye of law, be considered a proper place for the publication of the notice.

The question, as to who are substantial persons com-

¹ Reg VIII of 1819 Sec 8, cl 2. *Bykunt v Maharajah*, 17 W R 447, *sc*, 9 B L R 87, *per contra* *Hurry v Motee*, 14 W R 35, *Hunooman v Bipro*, 20 W R 132.

² *Ram Sebuk v Monmohini*, L R 2 I A 71, *sc*, 23 W R 113, *sc*, 14 B L R 394, *Sreemuttee v Pitambur*, 24 W R 129.

³ *Raghub v Brojonath*, 14 W R 489.

⁴ *Bhugwan v Sudder*, I L R 4 Cal 41, *Maharajah v Tarasundari* I L R 9 Cal 619, *sc*, L R 10 I A 19, *Rajnarain v Krishna*, I L R 14 Cal 703, *sc*, L R 14 I A 30, *Surnomoyi v Grish*, I L R 18 Cal 363. See also *Gobind v Chaudhurry*, I L R 9 Cal 172.

⁵ *Mungazee v Sreemutty*, 21 W R 369.

Attestation by
substantial
persons.

petent to attest the notice to be served on the land of the defaulter, was at one time the subject of considerable discussion. But the matter has now been set at rest by the judgment of the Judicial Committee of the Privy Council in *Ramsebak Bose v Monmohini Dasi and others*,¹ in which it has been held that respectable persons of good character, such as *mondols choutidars* and *holders of lakhiraj lands* are substantial persons. The proof of the service of notice is enough. The observance of special formalities in the mode of service or attestation by witnesses is merely directory.²

Zemindar res-
ponsible for
due publica-
tion of the
notices.

The zemindar is, in the words of the Regulation, 'exclusively answerable for the observance of the forms prescribed for the publication of notice.'³ The burden of proving due publication is entirely upon the zemindar who in every suit brought to contest the legality of the sale has to prove the due observance of all the formalities⁴ even if the plaintiff gives no evidence in support of his plea of non service. There is no presumption in favour of the zemindar of the notices having been duly served. It is not even incumbent upon a plaintiff who has brought a suit to contest the legality of a summary sale under the Regulation to set out distinctly the grounds for impeaching the sufficiency and due publication of the notices. The plea of non service of any particular notice or of any informality in publication may be taken at any stage of the suit and even for the first time in appeal.⁵

L R 21 A 71 c 23 W R 112 14 B L R 324 3
P C R 72 See also Stewart v P 25 W R 112
* See v L R 9 W R 238 Bham 41 Bham 11 21 W R 183
Reg VIII of 1819 Sec 2 cl 2
Dodge v Syd. 21 W R 377 Hutton v L R 11 19 v Tark
Sunder L R 9 Cal 619 (21 W R 11 A 12 B 12)
Mahomed L R 17 Cal 72 P 40 P 1111 v A 11 11 P
19 C 1 403
Ashby v Harrell L R 21 Cal 61 See also Bham 11 21
11 Bham 11 L R 1 C 1 41

The notice of sale at the middle of the year should contain a statement that "unless the whole of the advertised balance be paid before the date of sale or so much of it as shall reduce the arrear including any intermediate demand for the month of Kartik to less than one-fourth or a four-anna proportion of the total demand of the zemindar according to the kistbandi, calculated from the commencement of the year to the last day of Kartik"¹ This provision is not merely directory, it is mandatory, and the want of such a statement in the notice has been held to vitiate the sale²

Special notice
for the Sash-
mah sale

The mid-year sale usually takes place on the first of Aughran and, if that is a close day, on the first opening day of the month. But if the application could not be presented on the first day of Kartik, the day fixed for sale is thirty days from the first open day in Kartik. The sale on a proceeding at the end of the year takes place on the first day of Jaisth following, but if it is a Sunday or a holiday, the next subsequent day not being a holiday is fixed for the sale, thirty days' time being always allowed³

Date of sale

The Collector himself or an officer exercising the full powers of a Collector of the district⁴ and having revenue jurisdiction over the tenure is required to conduct the

Collector to
hold the sale.

¹ Reg VIII of 1819, Sec 8, cl 3

² *Asanulla v Hari*, I L R 17 Cal 474. Same case confirmed by P C reported in I L R 20 Cal 86

³ Reg VIII of 1819, Sec 8, cl 2. The practice of holding sales under Regulation VIII of 1819 on any day subsequent to the 1st day of Aughran or the 1st day of Jaisth, the full period of thirty days being allowed to intervene between the date of application and the date of sale, is based upon the authority of a decision of the late Sudder Court (*Woomes Chandra Roy v Esan Chandra Roy*, S D A 1859, p 1198) S D A, Construction No 329, 15th Sep 1820, *Huronath Goopto v Juggunath Roy Chowdhry*, 11 W R 87. See also *Sreemuttee v Pitambur*, 24 W R 129.

⁴ Act VI of 1853, Secs 1 and 9, and Act VIII (B C.) of 1865, Sec 3, *Ram Mohan v Radhanath*, S D A 1850, p 320

to each lot. If the statement of account produced is incorrect, and there is no arrear of rent at the date of sale, the sale held is void ¹. At the mid-year sale, the *kistbundec* of the defaulter should also be produced, so that the Collector may see that the amount of arrear at the date of sale exceeds a fourth part of the annual rent. The actual defaulter, whether he is registered or not, cannot bid, but every other person is free to do so. The zemindar himself is entitled to bid, or any under-tenant², including the *durputnidar* of the defaulter,³ if he has not fraudulently withheld payment of his rent. A person, who holds a mortgage of the putni, is not a defaulter, and is entitled to make the purchase.

Fifteen per cent of the purchase money, and not twenty-five per cent, as in execution-sales by a civil court, is required to be deposited by the highest bidder, and the balance of the purchase-money must be put in by the noon of the eighth day from the date of sale. If the deposit be not made by the noon of the eighth day, the putni is required to be re-sold on the ninth, that is, the following day. The first purchaser forfeits on such re-sale the advance of fifteen per cent, and is further liable for any deficiency at the second sale, the Collector being competent to realise the deficiency by the process for the execution of decrees of civil courts. The forfeited deposit is applied towards the defrayal of the expenses of the sale, and the surplus is forfeited to Government ⁴.

Deposit by
purchaser

The Commissioner of Revenue has the power to set aside any sale under Regulation VIII of 1819 on the ground of irrelevancy of law or procedure, or on proof of

Commis-
sioner to set
aside sum-
mary sales

¹ *Shuroop v Rajah*, 7 W R 218, *Mussamut v Radha*, 24 W R 63

² Reg VIII of 1819 Sec 9, *Mirza v Kishen*, W R (F B) 92, *sc*, 2 Hay 356, *Bykunt v Monee*, S D A 1850, p 89, *Srinath v Ramdhon*, S D A 1859, p 267, *Sreemutty v Govind*, S D A, 14th June 1862, p 260, *Gouree v Raj*, 5 W R 106

³ Reg VIII of 1819, Sec 9, *Fukeer v Hills*, 8 Sel Rep 153

⁴ Sec 9 as amended by Sections 1 and 2 of Act XXV of 1850

payment of the entire rent before the date of sale.¹ This, however, is a power which the Commissioners are slow to exercise, as any person interested in setting aside a sale may get complete remedy in a civil court.

Confirmation
of sale.

After the entire amount of purchase money is deposited on the eighth day, the sale becomes confirmed and the purchaser is entitled to get a sale certificate at once² and possession of the taluq. No formal order, of confirmation is required by law, the sale becoming *ipso facto* confirmed on the payment of the full purchase money.³ The limitation of suits to set aside a sale under the Regulation begins to run from the date of the payment of the full purchase money the period being one year under article 17 clause (d) of the second schedule of the Limitation Act (XV of 1877). The sale becomes final and conclusive on the payment of the full purchase money.

How sales
may be set
aside.

Besides the remedies by a summary investigation before the sale⁴ and an appeal to the Commissioner after sale the defaulter or any party interested in contesting the validity of the sale may sue the zemindar and the purchaser in the civil court for a decree for the reversal of the same on the ground of the non publication or irregular publication of any of the notices or want of arrears.⁵ An unregistered defaulter⁶ or an unregistered co-sharer of the defaulter⁷ an under-tenure holder whose tenure is voidable on the sale⁸ or a mortgagee may sue for setting aside the entire sale in the proper forum and on full

Act VIII (BC) of 1874 Sec 13. Reg VIII of 1872 Sec 14.
Bhambhani v. Moh. M. 1887 C. 15. 12 M. App. 152, 153 &
of 1873) decided on the 24th March 1884. 11 J. and B. 100. Pat. 5
17 W. R. 427.
Reg VIII of 1872 Sec 14 cl. 2. 11 J. and B. 100.
Itaj v. M. v. A. 1887 J. J. R. 196. 1883.
Ch. J. v. S. 1887 J. L. L. 112. C. 1887 J. 1887.
Sard v. 1887 J. L. R. 15 C. 316.
Gandhi v. 1887 J. L. R. 15 C. 316. 1887 J. 1887 J. 1887.
Cal 715.

valuation, and he may be entitled to a decree on a sufficient plea being made out. The zemindar as well as the purchaser are necessary parties in such suits. If the sale be set aside by the civil court, the zemindar is liable to pay full costs and damages, the purchaser also being fully indemnified against all losses.¹

Any durputnidar or any other under tenure holder, whether his name is registered in the zemindar's office or not, may protect the putni from sale by paying the amount of arrears,² and he is entitled to pay the amount into the Collectorate at any time before the sale. If the under-tenure holder is himself in arrear, the amount deposited by him would go towards the satisfaction of his debt³, but if he is not in arrear, and there is nothing due from him on account of rent to the zemindar, the amount lodged is considered to be an advance from private funds for which a statutory lien arises in favour of the person making the advance,⁴ and he is also entitled, on applying for the same to obtain immediate possession of the defaulting tenure in order to recover the amount so advanced. "If the defaulter shall desire to recover his tenure from the hands of the person or persons, who by making the advance may have acquired such an interest therein and entered into possession in consequence, he shall not be entitled to do so except upon repayment of the entire sum advanced with interest

Under tenure holders protecting the putni from sale entitled to be reimbursed.

¹ Reg VIII of 1819, Sec 14, cl 1, *Preolall v Gyan*, 13 W R 161, *Bykunt v Maharajah*, 17 W R 447, *Mobaruck v Ameer*, 21 W R 252, *Tara v Nafar*, 1 C L R 236

² Reg VIII of 1819, Sec 13, cl 2, *Raj v Gocool*, S D A, 1857, p 920, *Lukhi v Khettro*, 20 W R 380, *sc*, 13 B L R 146, the same case in H C, *Khettur v Lukhee*, 15 W R 125

³ Reg VIII of 1819, Sec 13, cl 3, *Lalit v Srinivas*, 1 L R 13 Cal 331

⁴ Reg VIII of 1819, Sec 13, cl 4, *Prem v Kishoon*, S D A, 1849, p 18, *Ram v Prem*, S D A, 1849, p 473, *Bhuggobuttee v Doorga*, S D A, 1858, p 890, *Umbica v Pranhuree*, 13 W R, F B, 1, *sc*, 4 B L R, F B, 77, *Nubo v Srinath*, 11 C.L.R., 37, *sc* 1 L. R 8 Cal 877.

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² Reg VIII of 1819, Sec 13, cl 2, *Raj v Gocool*, S D A, 1857, p 920, *Lukhi v Khettro*, 20 W R 380, *sc*, 13 B L R 146, the same case in H C, *Khettur v Lukhee*, 15 W R 125

³ Reg VIII of 1819, Sec 13, cl 3, *Laht v Srinivas*, 1 L R 13 Cal 331

⁴ Reg VIII of 1819, Sec 13, cl 4, *Prem v Kishoon*, S D A, 1849, p 18, *Ram v Prem*, S D A, 1849, p 473, *Bhuggobuttee v Doorga*, S D A, 1858, p 890; *Umbica v Pranhuree*, 13 W R, F B, 1, *sc*, 4 B L R, F B, 77, *Nubo v Srinath*, 11 C.L.R., 37, *sc* 1 L. R 8 Cal 877.

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After the entire amount of purchase money is deposited on the eighth day, the sale becomes confirmed, and the purchaser is entitled to get a sale-certificate at once² and possession of the taluq. No formal order, or confirmation is required by law, the sale becoming *ipso facto* confirmed on the payment of the full purchase money.³ The limitation of suits to set aside a sale under the Regulation begins to run from the date of the payment of the full purchase money, the period being one year under article 12 clause (d) of the second schedule of the Limitation Act (XV of 1877). The sale becomes final and conclusive on the payment of the full purchase money.

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AD VIII BC 3 1874 S. 12 Reg VIII of 1875 S. 14
Bh S. & Mahan M. 120 v. C. S. S. M. No. 1 S. 12
of 1877 decided on 14th Feb 1878 S. 12 of 1875 S. 14
17 W. R. 407

Reg VIII of 1875 S. 14 of 1875 S. 14 of 1875 S. 14

Reg VIII of 1875 S. 14 of 1875 S. 14 of 1875 S. 14

Ch. 120 v. S. 12 S. 12 S. 12 S. 12 S. 12 S. 12

S. 12 S. 12 S. 12 S. 12 S. 12 S. 12

120 v. S. 12 S. 12 S. 12 S. 12 S. 12 S. 12
Cal 786

valuation, and he may be entitled to a decree on a sufficient plea being made out. The zemindar as well as the purchaser are necessary parties in such suits. If the sale be set aside by the civil court, the zemindar is liable to pay full costs and damages, the purchaser also being fully indemnified against all losses.¹

Any durputindar or any other under-tenure holder, whether his name is registered in the zemindar's office or not, may protect the putni from sale by paying the amount of arrears,² and he is entitled to pay the amount into the Collectorate at any time before the sale. If the under-tenure holder is himself in arrear, the amount deposited by him would go towards the satisfaction of his debt³, but if he is not in arrear, and there is nothing due from him on account of rent to the zemindar, the amount lodged is considered to be an advance from private funds for which a statutory lien arises in favour of the person making the advance,⁴ and he is also entitled, on applying for the same to obtain immediate possession of the defaulting tenure in order to recover the amount so advanced. "If the defaulter shall desire to recover his tenure from the hands of the person or persons, who by making the advance may have acquired such an interest therein and entered into possession in consequence, he shall not be entitled to do so except upon repayment of the entire sum advanced with interest

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² Reg VIII of 1819, Sec 13, cl 2, *Raj v Gocool*, S D A, 1857, p 920, *Lukhi v Khettro*, 20 W R 380, *sc*, 13 B L R 146, the same case in H C, *Khettur v Lukhee*, 15 W R 125

³ Reg VIII of 1819, Sec 13, cl 3, *Lalit v Srinivas*, I L R 13 Cal 331

⁴ Reg VIII of 1819, Sec 13, cl 4, *Prem v Kishoon*, S D A, 1849, p 18, *Ram v Prem*, S D A, 1849, p 473; *Bhuggobuttee v Doorga*, S D A., 1858, p 890 *Umbica v Pranhuree*, 13 W R, F B, 1, *sc*, 4 B L R, F B, 77, *Nubo v Srinath*, 11 C.L.R., 37, *sc* I L. R 8 Cal 877.

at the rate of twelve per cent per annum up to the date of possession given as above, or upon exhibiting proof in a regular suit, to be instituted for the purpose, that the full amount so advanced with interest has been realised from the usufruct of the tenure.

The under tenure holder has also the right, which the ordinary law gives him, of suing for the advance and for declaration of his lien.

Limitation of
suits for
arrears of rent
when putni
sale is set
aside.

If after the sale becoming final it is set aside, the zemindar is entitled to bring a suit for the arrears under the ordinary Rent Law as if no application was made. If the suit for setting aside the sale remains pending for a long time limitation does not run as to the arrears of rent but upon the sale being set aside and upon the restoration of the parties to possession they take back the taluq subject to the obligation to pay the arrears. Until the sale is finally set aside the position of the zemindar is as if his claim has been satisfied. The sale is not also an act of trespass by the zemindar which can be considered as amounting to dispossession by the landlord. The defaulter is entitled to sue the purchaser if he has taken possession for mesne profits but he is himself liable to the zemindar for the arrears of putni rent and limitation does not run in his favour until the suit for the reversal of the sale is finally disposed of.

The right of
the purchaser
to avoid in
embrances.

On a sale under the Regulation being finally confirmed either no suit being brought or when a suit is brought the sale not being set aside by the civil court the under tenures such as *durpani*, *reputari* or *chakar putni* (talucs of the second, third and fourth grades and all charges created by the defaulter or any person holding under the defaulter and all charges existing on the putni that have accrued there to the 27

of the defaulter, become voidable. The purchaser is entitled to have possession of the taluq in the same state as it stood at its creation by the zemindar, free of all incumbrances ¹. Adverse possession of any part of the lands either by a neighbouring landlord or by any person claiming a lakhiraj title is an incumbrance which the purchaser is entitled to get rid of. Any incumbrance created or allowed to remain on the taluq by the act or omission of any taluqdar, whether the defaulter himself or a previous holder or any person who had previously made default which ended in a sale of the putni for arrears, is voidable ². But the purchaser must exercise his option within twelve years from the date of his purchase or rather the confirmation thereof, when the cause of action accrues, and he must by some act shew that he has exercised the power vested in him by law to avoid incumbrances. They are not *ipso facto* void, but are only voidable ³. If however he has accepted rent, his acquiescence may bar his right ⁴. He cannot sue the raiyats for rent, when there is an intermediate holder, before getting a decree for possession against such intermediate holder. I need hardly repeat that the incumbrances which a purchaser is entitled to avoid must be such as have come into existence since the date of the creation of the putni taluq ⁵. Any incumbrances existing from a previous date are not such as are void or voidable. Any under-tenure or incumbrance

¹ Reg VIII of 1819 Sec 11, *Mussamat v Luckheemonee*, S D A 1850, p 349, *Oomanath v Roghoonath*, W R, F B, 10, sc, 1 Hay 75 and Marsh 43, *Brojo v Futick*, 17 W R 407, *Gopendra v Mokaddam*, I L R 21 Cal 702

² *Gopendra v Mokaddam*, I L R 21 Cal 702

³ *Modhoo v Ramdhun*, 12 W R. 383, sc, 3 B L R 431, *Uma v Mothoora*, I L R 4 Cal 860, *Tetu v Mohes*, I L R 9 Cal 683, sc, 12 C L R 304.

⁴ *Srishteedhur v Prannath*, S D A, 1858, p 170, *Sreemunt v Kookoor*, 15 W R 481

⁵ *Bishumbhur v Doorga*, S D A, 1858, p 369.

created with the permission of the proprietor is also not voidable¹ Standing as the representative of the zemindar, the purchaser is affected by the same rules of limitation and the same rules as to the onus of proof as the zemindar himself The burden of proof is in the first instance upon the purchaser to shew when the incumbrance was created But as soon as he makes out this *prima facie* case the burden is shifted and the holder of the incumbrance has then to shew that he is protected either on account of the consent given by the zemindar or for any other reason valid in law

Merger

If the zemindar himself is the purchaser his position is the same as that of a stranger purchasing the property Limitation which would run against the defaulting putnidars would not bar him Neither does the law of merger—the extinction of the putni right in the higher right as zemindar—necessarily apply as the common law about merger, applicable in England is not applicable in this country The doctrine of equitable merger which depends upon the intention of the parties ought to be applied to transactions in this country unless there is express legislative enactment to the contrary A zemindar purchasing a putni under him in a sale either for arrears or under an ordinary decree of a civil court has *qua* the putni the position of a putnidar² unless by his acts and conduct he shews that he intends to deal with his two rights as one the inferior right merging in the superior

† Protected in
forests

There are certain rights in land which are protected notwithstanding a sale under the Regulation A *khajani* raiyat or resident hereditary cultivator are not liable to ejectment and *khajani* engagements with them by the defaulter cannot be interfered with by a purchaser³ But

¹ *Peacock v. The S. D. A.* 1892 p. 1317

² *J. v. S. v. C. v. L. R.* 12 Cal. 100 D. 1000 P. 1000
R. W. R. 411 43000 A. 1000 P. 1000

³ Reg. VIII of 1812 Sec. 11 & 12 *Magnum* P. 1000 P. 1000
3000 1000 L. R. 1000

if it can be proved in a regular suit that a higher rate was demandable from any raiyat at the date of the engagement, the rent of such a raiyat may be adjusted. Notwithstanding that the Regulation speaks only of *khodkast* raiyats, I presume occupancy and non-occupancy raiyats *and* are also protected. Protection from ejectment ought expressly to be extended to all classes of tenure-holders and raiyats included in section 160 of the Bengal Tenancy Act (VIII of 1885)

Distribution
of surplus
sale-pro-
ceeds

The distribution of the surplus sale-proceeds on a sale under the Regulation is dealt with in section 17. The Government is entitled to one per cent upon the net proceeds realised by the sale. Next, the zemindar gets the amount due to him with costs incurred by him in bringing the putni to sale. The remainder is in the first instance kept in deposit in the Collectorate to answer the claims of subordinate tenure-holders. If a subordinate tenure-holder has paid the rent due by him to the putnidar, he is entitled to bring a suit for compensation against the putnidar for his loss on account of the putni-sale, and a decree may be passed in his favour for compensation which should be directed to be paid out of the surplus sale-proceeds. But if any part of the amount due by the durputnidar as rent has remained unpaid, he is not entitled to bring a suit for damages, and has no claim to compensation¹. The principle seems to be that negligence on the part of a durputnidar in not fully paying the amount due by him may have contributed to the non-payment by the putnidar of the amount due by him to the zemindar. Any express contract between a putnidar and a durputnidar, as to the division of the surplus sale-proceeds, has always to be taken into consideration. Any suit under the Regulation by the durputnidar, claiming a part of the surplus sale-

¹ Ram v Kishen, S D A, 1845, p 155, Fukeer v Hills, 7 Sel Rep 154, Issan v Tareenee, Sev 84, Surnomayi v Land Mortgage Bank, 1 L R 1 Cal 173

proceeds, must be brought within two months from the date of the sale, otherwise the defaulter may claim to have the money paid out to him.¹

X The right of mortgagees to follow the sale-proceeds.

The rights of mortgagees of putni taluqs are not dealt with by the Regulation. But the surplus sale proceeds should be considered to represent the mortgaged property and a mortgagee will be entitled to be paid out in the first instance therefrom.² In the case of a contest between the mortgagee and the durputnidar, a question of priority may arise which I presume will be answered according to the law as laid down in the Transfer of Property Act and the principles of equity and good conscience which the legislatura in this country directs to be applied wherever the positive law is silent.

Arrears of rent for the period antecedent to the sale.

Antecedent balances due by the putnidar to the zemindar namely those that are not covered by the summary proceedings under the Regulation become mere *personal* debts of the individual taluqdar and must be recovered in the same way as other debts by a regular suit in the civil court. Arrears that have accrued subsequent to the application under the Regulation are a charge on the taluq and the purchaser is bound to pay the same. He cannot excuse himself by pleading that he has taken possession after a part of the arrears accrued. Such arrears are realizable by the summary process. If a putni taluq is sold for arrears of rent in execution of a civil-court decree and the sale is confirmed within the first six months of the Bengali year a question arises as to the right of the zemindar to bring the putni to sale under the Regulation for the entire arrears of the first six months. The High Court at Calcutta has answered the question in the affirmative.³

This rule of limitation does not apply where there is a special contract between the putnidar and the zemindar. — *Jahid v. Khatun* 3 B. R. 2.

¹ Act IV of 1859. See 93. *Ganga v. L. R. v. C. 411*
² *Mahlan Lal Roy and others v. B. v. H. v. H. v. H.* 3 B. R. 277
³ 30 of 1851 decided on the 12th August 1851.

A purchaser of a putni taluq under the rules laid down in the Regulation is entitled to have his name registered in the proprietor's office and to obtain possession without the payment of any fee, but he is liable to be called upon to give security under the conditions of the tenure purchased¹ A purchaser at a sale under a decree for arrears of rent held by a civil court or by a Collector under Act X of 1859 is also entitled to be registered without fee²

X Registration of the purchaser's name

A purchaser at a sale under an ordinary civil-court decree, or a voluntary alienee is required to pay to the proprietor a registration-fee at two per cent on the rent, the maximum sum being Rs 100³ He may also be required to furnish security to the extent of one-half of the annual rent⁴ If no security be given, the taluq may be attached by the proprietor and kept in the possession of *sezawal* or curator Any question as to sufficiency of the security may be determined by the civil court of the district⁵ and the judgment of such court is final⁶ The zemindar cannot bring a suit for compelling the purchaser⁷ to give security

X Registration-fee and security

The registration of name in the landlord's office is one of great importance to the outgoing putnidar as well as the purchaser The outgoing putnidar is

X Effect of registration

*¹ Reg VIII of 1819, Sec 5

*² Act X of 1859, Act VIII (B C) of 1869, and Act VIII of 1885, Sec 14

*³ Reg VIII of 1819, Sec 5, Act X of 1859, Sec 27, and Act VIII (B C) of 1869, Sec 26 and Act VIII of 1885, Sec 12 Sections 13 and 14 of the latter Act make provision in cases of execution-sales But see section 195, cl (e) of Act VIII of 1885 and *Gyanada v. Bromomoyi*, I L R 17 Cal 162

*⁴ Reg VIII of 1819, Secs 5 and 6

*⁵ *Ibid*, Sec 6 Can security be required on a sale in the civil court for arrears?

* *Rajah v Bissen*, S D A, 1859, p 1216, *Huree v Soorja*, 25 W.R 222, *in re Soorjakant*, I L R 1 Cal 383

* *Joy v Jankee*, 17 W. R 470.

thereby freed from all personal liability¹ on account of arrears accruing subsequent to the cessation of his possession and the registration of the purchaser's name entitles him to deal directly with the landlord and to have notices and summonses of all proceedings and suits for recovery of arrears of rent. He thus gets a direct opportunity of protecting the tenure. If the purchaser's name is not registered in the landlord's office the latter may bring suits against the registered putnidar for recovery of arrears of rent or institute proceedings under the Regulation and the effect of the sale thereunder will be the same as if the purchaser has himself been sued² unless it can be proved that fraud has vitiated the sale. On a sale in suits or proceedings against the registered taluqdar or durputnidar or a mortgagee may be affected in the same way as if the proceedings were against the actual putnidar. The non registration of name in the landlord's office does not however make the alienee a trespasser. He becomes in all intents and purposes the putnidar subject only to the disabilities stated above³. It should be noted that applications for registration of name may be made or suits for compelling the landlord to register may be instituted at any time after the purchase and there is no bar of limitation⁴ the cause of action being a recurring one.

The provisions of the Bengal Tenancy Act with respect to the registration of permanent tenures in the Amindars' office as contained in sections 12, 13, 14, 15 and 16 of the Act have been held to be superfluous to the provisions contained in the Regulation⁵.

¹ R. Watson v. Collector 11 H. L. A. 102; 1331 v. Khan 13 B. L. R. 127; 20 W. R. 354.

² Indur Mohi 10 A. W. R. 117; 1 P. 531; 15 W. R. 107; 14 W. R. 451; 1 P. 100; 17 W. R. 121.

³ R. v. Tumb 11 W. R. 171.

⁴ Collector v. R. 11 L. R. 102; 13 W. R. 107; 1 P. 100.

⁵ Calcutta.

⁶ Durga v. B. 11 L. R. 102.

The laws in force for the recovery of government revenue declare that, on a sale of an entire estate for arrears, "the purchaser shall acquire the estate free from all incumbrances, which may have been imposed upon it after the time of settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants," with certain exceptions,¹ one of which is taluqdari tenures such as putnis and dependent taluqs duly registered under the provisions of Act XI of 1859.² The registration under the Act is either *common* or *special*.³ Common registry secures such tenures and farms against any auction-purchaser at a sale for arrears of revenue, except the Government. Special registry secures such tenures and farms against any auction-purchaser, at a sale for arrears of revenue, including the Government. Applications to the Collector for registration of tenures, created before the passing of Act XI of 1859, were required to be made within three years from the 21st April, 1862.⁴ Applications for the registry of tenures, existing on the 21st April 1862, but created after the passing of Act XI of 1859, were required to be made within three months. An application for the registration of any tenure, created after the passing of Act III of 1862 (21st April 1862), must be made within three months from the date of the deed constituting the tenure. Objections to the registration of tenures under Act XI of 1859 may be summarily dealt with by the Collector, and the Collector may also suspend the proceedings pending a decision by the civil court, the decision of such court being final.⁵ But no civil court can direct special registration by the Collector, and no special registration can be effected without the sanction of the Revenue Commissioner of the Division.⁶

Common and special registry of taluqs

¹ Act XI of 1859, Sec 37. See also Act VII (B C) of 1868, Sec 12.

² Act XI of 1859, Sec 37, cl 3.

³ Act XI of 1859, Sec 39.

⁴ Act III (B C) of 1862.

⁵ Act XI of 1859, Sec 41.

⁶ Act XI of 1859, Sec 42.

Sales subject
to fiduciary
branches

The purchaser of a share or shares of an estate sold for arrears of revenue purchases subject to incumbrances and does not acquire any rights which were not possessed by the previous owner or owners.¹ *Benami* purchases by defaulters even of an entire estate have also the same effect upon incumbrances.² If the purchase be made by one or more of a large number of defaulters the result is the same as regards holders of incumbrances.³

Sales free of
incumbrances

Taluqs not registered in the common or special registers are liable to be avoided by a purchaser of an entire estate. An assignee of such a purchaser has also the same right though the privilege has not been extended to assignees of fractional shares.⁴ The burden of proving that the taluq came into existence subsequent to the Permanent Settlement is upon the purchaser. But a *prima facie* case being made out the onus shifts and it is then for the defendant to make out a case which would bring the tenure within any of the exceptions to section 37 of Act VI of 1859.⁵ The period of limitation of suits to avoid incumbrances is twelve years from the date when the sale becomes final and conclusive.⁶

Road and
Public works
cesses.

The amount of road and public works cess payable by taluqdars is leviable according to the provisions of section 41 clause of the Cess Act of 1883.⁷ The clause runs thus— Every holder of a tenure shall yearly pay to the holder of the estate or tenure with which the taluq

Act VI of 1859 Sec 38 See Sec 33 Act of 1859 A. I. 13 P. 139 B. 17 H. 1843 B. L. R. A. C. 417 B. 1844 P. 2 W. F. 1844
1846 B. 1847 A. 1848 B. 1849 P. 1850 B. 1851 P. 1852 B. 1853 P. 1854 B. 1855 P. 1856 B. 1857 P. 1858 B. 1859 P. 1860 B. 1861 P. 1862 B. 1863 P. 1864 B. 1865 P. 1866 B. 1867 P. 1868 B. 1869 P. 1870 B. 1871 P. 1872 B. 1873 P. 1874 B. 1875 P. 1876 B. 1877 P. 1878 B. 1879 P. 1880 B. 1881 P. 1882 B. 1883 P. 1884 B. 1885 P. 1886 B. 1887 P. 1888 B. 1889 P. 1890 B. 1891 P. 1892 B. 1893 P. 1894 B. 1895 P. 1896 B. 1897 P. 1898 B. 1899 P. 1900 B. 1901 P. 1902 B. 1903 P. 1904 B. 1905 P. 1906 B. 1907 P. 1908 B. 1909 P. 1910 B. 1911 P. 1912 B. 1913 P. 1914 B. 1915 P. 1916 B. 1917 P. 1918 B. 1919 P. 1920 B. 1921 P. 1922 B. 1923 P. 1924 B. 1925 P. 1926 B. 1927 P. 1928 B. 1929 P. 1930 B. 1931 P. 1932 B. 1933 P. 1934 B. 1935 P. 1936 B. 1937 P. 1938 B. 1939 P. 1940 B. 1941 P. 1942 B. 1943 P. 1944 B. 1945 P. 1946 B. 1947 P. 1948 B. 1949 P. 1950 B. 1951 P. 1952 B. 1953 P. 1954 B. 1955 P. 1956 B. 1957 P. 1958 B. 1959 P. 1960 B. 1961 P. 1962 B. 1963 P. 1964 B. 1965 P. 1966 B. 1967 P. 1968 B. 1969 P. 1970 B. 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2096 B. 2097 P. 2098 B. 2099 P. 2100 B. 2101 P. 2102 B. 2103 P. 2104 B. 2105 P. 2106 B. 2107 P. 2108 B. 2109 P. 2110 B. 2111 P. 2112 B. 2113 P. 2114 B. 2115 P. 2116 B. 2117 P. 2118 B. 2119 P. 2120 B. 2121 P. 2122 B. 2123 P. 2124 B. 2125 P. 2126 B. 2127 P. 2128 B. 2129 P. 2130 B. 2131 P. 2132 B. 2133 P. 2134 B. 2135 P. 2136 B. 2137 P. 2138 B. 2139 P. 2140 B. 2141 P. 2142 B. 2143 P. 2144 B. 2145 P. 2146 B. 2147 P. 2148 B. 2149 P. 2150 B. 2151 P. 2152 B. 2153 P. 2154 B. 2155 P. 2156 B. 2157 P. 2158 B. 2159 P. 2160 B. 2161 P. 2162 B. 2163 P. 2164 B. 2165 P. 2166 B. 2167 P. 2168 B. 2169 P. 2170 B. 2171 P. 2172 B. 2173 P. 2174 B. 2175 P. 2176 B. 2177 P. 2178 B. 2179 P. 2180 B. 2181 P. 2182 B. 2183 P. 2184 B. 2185 P. 2186 B. 2187 P. 2188 B. 2189 P. 2190 B. 2191 P. 2192 B. 2193 P. 2194 B. 2195 P. 2196 B. 2197 P. 2198 B. 2199 P. 2200 B. 2201 P. 2202 B. 2203 P. 2204 B. 2205 P. 2206 B. 2207 P. 2208 B. 2209 P. 2210 B. 2211 P. 2212 B. 2213 P. 2214 B. 2215 P. 2216 B. 2217 P. 2218 B. 2219 P. 2220 B. 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2346 B. 2347 P. 2348 B. 2349 P. 2350 B. 2351 P. 2352 B. 2353 P. 2354 B. 2355 P. 2356 B. 2357 P. 2358 B. 2359 P. 2360 B. 2361 P. 2362 B. 2363 P. 2364 B. 2365 P. 2366 B. 2367 P. 2368 B. 2369 P. 2370 B. 2371 P. 2372 B. 2373 P. 2374 B. 2375 P. 2376 B. 2377 P. 2378 B. 2379 P. 2380 B. 2381 P. 2382 B. 2383 P. 2384 B. 2385 P. 2386 B. 2387 P. 2388 B. 2389 P. 2390 B. 2391 P. 2392 B. 2393 P. 2394 B. 2395 P. 2396 B. 2397 P. 2398 B. 2399 P. 2400 B. 2401 P. 2402 B. 2403 P. 2404 B. 2405 P. 2406 B. 2407 P. 2408 B. 2409 P. 2410 B. 2411 P. 2412 B. 2413 P. 2414 B. 2415 P. 2416 B. 2417 P. 2418 B. 2419 P. 2420 B. 2421 P. 2422 B. 2423 P. 2424 B. 2425 P. 2426 B. 2427 P. 2428 B. 2429 P. 2430 B. 2431 P. 2432 B. 2433 P. 2434 B. 2435 P. 2436 B. 2437 P. 2438 B. 2439 P. 2440 B. 2441 P. 2442 B. 2443 P. 2444 B. 2445 P. 2446 B. 2447 P. 2448 B. 2449 P. 2450 B. 2451 P. 2452 B. 2453 P. 2454 B. 2455 P. 2456 B. 2457 P. 2458 B. 2459 P. 2460 B. 2461 P. 2462 B. 2463 P. 2464 B. 2465 P. 2466 B. 2467 P. 2468 B. 2469 P. 2470 B. 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held by him is included, the entire amount of the road cess and public-works cess, calculated on the annual value of the land comprised in his tenure at the rate or rates which may have been determined for such cesses respectively for the year as in this Act provided, less a deduction to be calculated at one-half of the said rates for every rupee of the rent payable by him for such tenure" Every taluqdar is, under this clause, bound to pay to the zemindar for the two kinds of cesses a sum calculated at one anna per rupee on the amount given in the valuation-roll of the taluq, less a half-anna for each rupee of the rent payable by him. He is himself entitled to realize one-half of an anna for each rupee of rent payable by the rayats, and he is thus made to pay from his own purse half an anna on each rupee of his profits. But he may, notwithstanding this statutory provision, be bound by any contract with the zemindar to pay the entire amount of the cesses realizable by the Collector for the taluq. His liability is determined by the terms of the contract. It very frequently happens that, by the terms of the lease, the zemindar is entitled only to a net income in the shape of an annuity, the taluqdar being bound to pay all items of demand by the Government.¹

Cesses are recoverable in the same way, and under the same procedure, and in similar instalments, as *rent*, though they cannot be, strictly speaking, *rent*.² They are not charges on the tenure in the same way as *rent*, and a sale, for arrears of cesses only, has not the same effect as to incumbrances as a sale for arrears of rent.

Cesses recoverable as rent

There are various other kinds of taluqs held directly under the zemindars at fixed rent, in perpetuity, known, in Bengal, by different names in different districts. Their

Other kinds of taluqs

¹ Surnomoyee v. Koomar, 1 L. R. 4 Cal. 576

² Act IX (B. C.) of 1880, Sec. 47. For definition of rent—see Sec. 3 of Act VIII of 1885, Uma Charan v. Ajidanniss, 1 L. R. 12 Cal. 430

incidents are the same as those of dependent and putni taluqs. Every district has peculiar names for these tenures and subordinate tenures or under tenures with various shades of rights and liabilities. The legal profession and the judges administering law are constantly puzzled with local names and local peculiarities. Sufficient data have not yet been obtained with respect to them and even if they are available it will be difficult to lay down rules for the guidance of courts, except by taking the different localities piecemeal. In many instances the rights and obligations of the holders are regulated by custom.

*Construction
of taluqdari
leases

The holders of permanent taluqdari tenures are not liable to ejectment, except on breaches of contract. They are generally heritable and transferable. But exceptions are not unfrequent. Taluqdari grants for life only though at fixed rent are not uncommon and it has been held that a lease at fixed rent without words creating a heritable or transferable right is a lease for life only with reversion to the landlord. But every grant must be construed according to the ordinary rules of interpretation—custom and usage in the locality, the surrounding circumstances and the way in which the lands demised has been dealt with by the parties being taken into consideration. If the zemindar has allowed sons and grandsons in succession or alienees after alienees to hold a tenure the presumption will be that it is heritable and transferable even without express words to that effect in the grant.

†King the ultimate
heir

A permanent tenure being heritable and transferable the king is the ultimate heir in default of any other heir and not the zemindar in whose estate the tenure is situated. The zemindar has no reversion.

Act VIII of 1819, Sec. 1

To All Rans of P. B. C. 117 & L. R. 111 A &

B. 1 & B. 1 L. R. 1 Cal. 117 & L. R. 111 A & 1

C. L. R. 111

Sec. 117 & L. R. 111

These taluqs are partible as any other property, and civil courts have exclusive jurisdiction in directing and effecting partition. But the zemindar is not bound to apportion the rent payable to him on a division of the taluq.¹ He is at liberty to hold the entire taluq liable for the entire rent without reference to the division made amongst the co-sharers.

X
Partition of
taluqs

We have already seen that if a taluq has been in existence either from before or from the exact date of the Permanent Settlement, and the rent has never been varied, it acquires fixity by the operation of Act X of 1859.² A mere declaration in a decree that any such tenure was liable to enhancement, if there was actually no enhancement of rent, would not prevent the operation of the statutory provision contained in section 15 of Act X of 1859, or section 50 of the Bengal Tenancy Act.

X
Effect of mere
declaration of
the right to
enhance

A dependent taluq, of which the rent has varied from the date of the Permanent Settlement, is not liable to be annulled on the sale of an entire estate for arrears of revenue under Act XI of 1859. The exemption, however, with reference to these taluqs, existing at the time of the Settlement, but not at fixed rent, is only as respects ejectment, but not enhancement.³ The rent is liable to be enhanced at the instance of the purchaser of an entire estate, in the same way and under the same conditions as at the instance of any other holder of the estate.⁴ The policy of the earlier sale-laws and the Settlement Regulations was not to eject tenure-holders, but to cancel their leases and to allow them to hold on upon payment of customary rent. This policy was in accordance with the common law and the established usages of the country, but it has been ignored in later

X
Ejectment.

¹ Act VIII of 1885, Sec. 88

² Ante p. 137, 8

³ Act XI of 1859, Sec. 37, cl. 2

⁴ Ante p. 140.

to taluqdari tenures Suits for enhancement of rent of such tenures generally failed for want of evidence as to customary or pergunah rates, and in many cases, courts simply granted decrees declaring the liability of the tenure to enhancement, without being able to grant consequential relief It was, therefore, thought necessary to lay down definite rules in the Bengal Tenancy Act Though the rates payable by taluqdars and those payable by raiyats are different, courts in some instances, in the absence of definite rules, decreed suits for enhancement, giving the taluqdars reasonable amounts for collection-charges and profit There was, however, no rule for determining what was reasonable profit Accordingly, the Bengal Tenancy Act has laid down, that in the absence of evidence as to customary rate, rent may be enhanced up to such limits as the court thinks fair and equitable ¹ The Act also lays down what fair and equitable rent is ² In order to avoid the hardship of an excessive immediate increase of rent, power is given to order gradual enhancement yearly for a number of years, not exceeding five, until the limit of the enhancement allowed has been reached ³ The Act also provides that when rent of a tenure-holder has been enhanced by the Court or by contract, it shall not again be enhanced by the Court during the fifteen years next following the year in which rent at the enhanced rate is first allowed to be levied ⁴

The protection, which the law has afforded to tenures existing at the date of the Settlement, ought, with modifications, to be extended to other tenures of long standing, in consonance with the provisions of the earlier Regulations of the Bengal Code As the law now stands, such tenures have no permanency, and in the absence of any contract, they are liable to be cancelled

^x Remarks

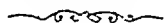
¹ Act VIII of 1885, Sec 7, cl 2 ² Act VIII of 1885, Sec 7, cl 3

³ Act VIII of 1885, Sec 8

⁴ Act VIII of 1885, Sec 9

and determined by proper notice. The purchaser on a sale for arrears of revenue of an entire estate may deal with the holders of these tenures as trespassers and may eject them without notice some overt act indicative of the desire of the purchaser to avail himself of the stringent provisions of section 37 of Act VI of 1859 being sufficient to give a cause of action for the institution of a suit for ejectment.

LECTURE VI



PERMANENT TENURES

AND

UNDER-TENURES

We have already seen¹ that the *Smritis*, the recorded utterances of the law-givers of ancient India, afford no indication that intermediate holders were recognised or even known in those days. The owner of the land, whether an individual or a joint family consisting of coparceners, cultivated it with the occasional assistance of servants and hired labourers—the hire being generally the payment of a share of the crops. The system of intermediate holding originated, in all probability, under Mahomedan rule. The financiers of the Afghan and the Moghul emperors attempted, now and then, to put down the growing system, but without success. It made extraordinarily rapid progress about the time of the downfall of the imperial power at Delhi and the first establishment of the British rule. Causes which led to the feudalization of Europe were at work at this time, just as they were about the time of the breaking-up of the Carlovingian Empire. As each satrap under the Great Moghul aspired to independence and hereditary kingship, each subordinate holder was anxious to have a similar kind of permanent and hereditary interest in the land held by him, and the idea being once in, it filtered down to the lowest strata of intermediate holders. Ejectment under legal right and legal procedure was unknown, and was looked upon with horror by a people, fond, more than any other on the face of the earth, of holding the

Intermediate
tenures un-
known in
earlier times

Causes that
led to the
creation of in-
termediate
tenures.

¹ *Antep* 12

degree) and *se-maurusi-mukunari* (hereditary and at fixed rent of the third degree). Similarly, there may be under-tenures of the fourth grade (*chahar-maurusi* &c) and further incudation. Putni taluqs, durputni taluqs or se-putni taluqs are in reality *mukunari* and *maurusi*, *dur mukunari* and *dur-maurusi*, and *se-mukunari* and *se-maurusi* tenures and under-tenures, the distinction being that the putni class covers an entire village or villages in revenue-paying estates, while the latter class covers portions of land within defined boundaries, or are demises of land held revenue-free. There is also another distinction—*vis*, talucs are always grants of intermediate tenures between the zemindar and the raiyat, while *mukunaries* are not necessarily grants of intermediate tenures. *Istemari* grants combine the two qualities of the *mukunari* and the *maurusi*. In their broad features, all grants of tenures *in perpetuity* and *at fixed rent*, or with either of these qualities, by whatever name they are designated, come within the classes I have indicated above.

Tenures held at fixed rent and in perpetuity (*istemari* or *mukunari* and *maurusi*) are in reality instances of alienations of land, subject only to payment, by the alienees and all persons holding through them, of fixed sums in perpetuity to the alienors and those claiming under them. This sum is called *rent* in the English language, though, in reality, it is an *annuity* with a charge on the land demised. Under the Mahomedan law as administered in India, the amount payable was not a charge—it was merely a personal obligation in the tenure holders. Even after the Rent Act of 1859 had come into force, and for a long time afterwards, the judges were not agreed as to whether rent was a charge on the tenure.¹ The doubt, however, has been set at rest by

Rent

¹ *Pran v Surbo*, 10 W R 434, *Ram v Hridoy*, 10 W R 446, *Samiraddi v Haris*, 3 B L R, A C, 49, *Dowlut v Moonshee*, 15 W R 341, *Wahed v Sadiq*, 17 W R 417

the legislature in section 63 of the Bengal Tenancy Act which makes rent the first charge.¹ In the view of the framers of the Regulation Laws in Bengal the transfer of land at fixed rent in perpetuity was a transfer of proprietary right. They did not use the word *rent* with reference to this annuity payable to the transferor but used the word *revenue*. Later on a distinction was made between revenue and rent²—a distinction drawn from a similar use of the words in England. The term *revenue* used with reference to land is now understood to mean the amount which is paid by the superior landowners to the State while *rent* is the amount payable to the superior landowners by those who hold under them whether they are the actual occupants or intermediate holders. The word *rent* has been very broadly defined in the Bengal Tenancy Act and I believe the definition is practically accepted even in districts to which the Act has not been extended i.e. Orissa and the Scheduled districts. Whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant includes all kinds of rents even *quit rent*.³ Under that Act the Government is a landlord with respect to the *khajur nichals*⁴ and it follows therefore that with respect to the *khajur nichals* the amount payable to the State by a tenant is also rent. The amount payable by a tenant at a fixed rate in perpetuity is thus called rent and even if instead of a fixed sum of money a fixed amount of corn or any other produce such as a fixed number of *man* be agreed to be supplied yearly for the use of the land it is still called rent.⁵ This use of the word in cases of *man* is not

¹ Act VIII of 1859 Sec 63

² See *Encyclopædia Britannica* 1890 B. I. P. 2 Vol. 11 B. 1. 1000
 Act 10 of 1859 Sec 63

³ Act VIII of 1859 Sec 63

⁴ Act VIII of 1859 Sec 63

⁵ Act VIII of 1859 Sec 63

1711 leases is also in consonance with the Transfer of Property Act,¹ which includes permanent tenures at fixed rent within the definition of leases of immoveable property. We have, in this use of the word *rent* an instance of an unconscious, though a complete, change of ideas from what the early British rulers in India entertained, as to the legal effect of the transfer of property in the soil by means of grants in perpetuity. The Hindu conception would make the actual occupant the master or lord of the soil, the Afghan and the Moghul sovereigns would ignore the actual occupier and assume proprietorship in themselves, the early British rulers of India, conceiving the right to be in the State, could and did transfer it, reserving only a perpetual sum as land-tax, and the modern legislator would make the rent-receiver or the rent-receivers in succession the owner or owners of land, and according to him, the rent-payer, though directly in occupation, paying only a fixed sum in perpetuity and incapable of being ejected (the rent-receiver having no reversion), pays for the use and occupation only of the land. This is anomalous—perhaps, an imperfection in language, but the anomaly cannot now be helped. It is the necessary result of the use of foreign words to express Indian conceptions. Such misuse of words is, however, common in sciences other than the science of law, and however much to be regretted, is unavoidable.

Where there are written contracts, the terms thereof regulate the relation between the lessor and the lessee. But legal rules of interpretation have occasionally to be invoked to find out the real intention of the parties, whenever the language and the context are inartificial or difficult to understand and reconcile. The law, not unfrequently, affords protection, notwithstanding the express terms of a contract, when they are

X Written contracts of lease

¹ A&T IV of 1882, Chap V

too hard and stringent and when equity or public policy requires that the parties should be released from their operation. Rules of law have also been deemed to be necessary for the protection of the lessors and their heirs or assignees from the effects of alienation by the lessees without the knowledge and consent of the lessors. Instances are also not uncommon of the instruments of lease being silent as to matters of importance in the relation ship between the parties and customary and codified laws and customs have to be invoked for the judicial determination of the rights of the parties in such cases.

Presumption
of perma-
nency

But written grants are not always available. In most cases either they never existed or they are lost. In such cases presumptions of facts and occasionally positive law are availed of to make up for a written instrument. In the provinces in which the Rent Act of 1859 or the Bengal Tenancy Act does not apply the holding of land for a very long time and by successive generations on uniform payment of rent may in the absence of evidence to the contrary be sufficient for a presumption of a tenure being permanent and at fixed rent by a grant which is lost. It may be asserted that in all such cases it is reasonable to presume from the long occupation of land by the title holder and his sons and grandsons in a continuous and on uniform payment of rent that the original or intended to create a permanent lease. If in addition the mere holding at uniform rent evidence befort of several transfers by the original grantor or his heirs or assigns or by the other party presumption may also be made of the tenure being transferable. Such presumptions however are always rebuttable. They are not based upon any artificial rule of law or legal fiction but it is an inference that may be drawn from

common course of natural events and human conduct¹
 It is thus competent for a judge of facts to come to the conclusion, from long existence of a tenancy, payment of rent at the same rate, alienations from time to time, erection of substantial works on the land, and similar other matters, that the tenure must have been of a permanent nature by the grant creating it, the use being the best evidence of its nature²

The Indian legislature has, as we have already seen, laid down positive rules, for making presumptions of fact in such cases. Taking the Permanent Settlement of 1793 as the starting point, it has framed rules for the assumption of a statutory title to permanency in favour of persons holding land from that date on payment of uniform rent. It is difficult, however, to prove possession and payment of rent for such a long time, and possession for twenty years and uniform payment of rent for that period raise a rebuttable presumption, not of a grant which has been lost, but of possession and the payment of rent at the same rate from the time of the Permanent Settlement. In the provinces in which the Rent Acts of 1859, 1869 or 1885 apply, a person who can shew possession and payment of rent from the time of the Permanent Settlement, has the benefit of a perpetual lease, irrespective of the existence of any original title-deed.

But if there be a title-deed of a date posterior to the Permanent Settlement, or if it can be shown that the tenure was held on a terminable lease, the Rent Acts give no relief, notwithstanding possession and uniform payment of rent. But a lease, renewing an old lease, the rental remaining the same and not giving the superior holder a right of re-entry, does not prevent the operation of the statutes³. It is, however, for the tenant to shew

X
Statutory
title

X
When such
title is not
created

†¹ Act I of 1872, Sec 114

†² *Optimus interpret rerum usus* —Broom's Legal Maxims

†³ *Ram v Romesh*, 2 W R (Act X) 47, *Kishen v Eshan*, 4 W R (Act X) 36, *Luch nee v Koochil*, 6 W R (Act X) 46, *Greesh v Kalee*,

that the new lease is only confirmatory, and if he cannot do so he will not be entitled to the presumption. Even if he sets up a written lease which is found to be false, he may in the alternative rely upon a statutory title. The words in section 15 of Act X of 1859 are—"otherwise than on a terminable lease." In the Bengal Tenancy Act these words have been amplified into—"held for a term of years or determinable at the will of the landlord."

†Suits for enhancement.

The question whether any tenure or uodertenance is permanent and held at fixed rent frequently arises in suits for enhancement of rent or for declaration of the right to enhance the rent, or for ejectment. The defendant claiming to be a permanent tenureholder and relying upon a statutory title should plead¹ distinctly that the tenure has been in existence on payment of uniform rent since the date of the Permanent Settlement and the issue in the case is whether the tenure has been in existence from that date and whether rent has been paid without any variation. Strict rules of pleadings are not applied in this country² and if the defendant's written statements contain allegations sufficient for the court to come to a finding of payment of rent at an uniform rate for twenty years the Court may give relief, as if a plea of a demise from the Permanent Settlement has been raised.³ Proof of uniform payment of rent for twenty years, preceding the year in which the suit was instituted raises a presumption in favour of the defendant's plea.

6 W. R. (Act X) 58; *Sheikh v. Pooroo* 8 W. R. 129; *Watson v. Anjanna* 10 W. R. 107; *Ram v. Jagdish*, 19 W. R. 353; or 12 B. L. R. 229; *Pearce v. Koylas* 23 W. R. 58; and *Soorjo v. Pearce* 25 W. R. 331.

¹ *Sheikh Ekram v. Bebes Bahooran* 2 W. R. (Act X) 6; *Ghooza v. Otar* 4 W. R. (Act X) 15; *Dhu v. Chunder* 4 W. R. (Act X) 43.

² *Manmohan v. Husrut*, 2 W. R. (Act X) 39; *Saduck v. Mohamya*, 5 W. R. (Act X) 16; *Rakhal v. Kinoo* 7 W. R. 242; *Munee v. Aswad*, 8 W. R. 6; *Huruck v. Toolsee* 11 W. R. 84; *Bhooyrub v. Muffy* W. R. Sp. Vol. (Act X) 100. See also *Watson v. Chota*, Marsh 68 and *Mogno v. Haro* 6 W. R. (Act X) 27.

Dhu v. Chander 4 W. R. (Act X) 43.

As to the amount of proof necessary, it is always a question of fact to be decided from the circumstances of each case. The reported decisions¹ on the point, laying down rules and giving directions for the mode of dealing with the evidence, are not apparently consistent with one another. Each case depends upon its own facts and circumstances, and it is extremely difficult to lay down rules of law applicable to all cases. It has been held that there should be no room for an inference of payment at fixed rent for twenty successive years,² and that strict proof is necessary. Again it has been held that such proof is not necessary,³ provided the proof of payment extends over twenty years. Payment⁴ of the same amount every year need not be proved, but the rate⁵ must be the same. Small variations⁶ arising from calculation may be dispensed with as immaterial and

Amount of proof necessary for a presumption of uniformity

¹ *Ram v Chunder*, 2 W R (A&T X) 74, *Jugmohan v Poornoo*, 3 W R (A&T X) 133, *Hem v Poorno*, 3 W R (A&T X) 162, *Raj v Assa*, 3 W R (A&T X) 170, *Nyamut v Gobind*, 4 W R (A&T X) 25, *Dhun v Chunder*, 4 W R (A&T X) 43, *Kazee v Nubo*, 5 W R (A&T X) 53, *Gooroo v Sheikh*, 5 W R (A&T X) 86, *Sham v Muddun*, 6 W R (A&T X) 37, *Rakhal v Kinoo*, 7 W R 242, *Poolin v. Neemaye*, 7 W R. 472, *Soodistee v Nuthoo*, 8 W R 487, *Chamarnee v Ayenoolla*, 9 W R 45, *Pearee v Radha*, 10 W R 427, *Huruck v Toolsee*, 11 W R. 84, *Miterjeet v Toondun*, 12 W. R 14, *sc*, 3 B L R App 88, *Kunda v Gunesh*, 15 W R 193, *Nilmonnee v Anunt*, 15 W R 393

² *Rajnarain v Mrs Olivia*, 1 W R 45; *Mahmooda v Hareedhun*, 5 W. R (A&T X) 12, *Ram v Chand*, 5 W R (A&T X) 84, *Prem v Shaikh*, 6 W R (A&T X) 90, *Sham v Boistab*, 7 W R. 407

³ *Rashmonnee v Hurronath*, 1 W R 280, *Radhanath v Binode*, 3 W. R (A&T X) 157, *Surnomoyi v Baboo*, 9 W. R 207, *Bungo v Ram*, 10 W R 256, *Rashbehary v Ram*, 22 W R 487, *Radha v Aghore*, 25 W R 384.

⁴ *Tarinee v Kalee*, 3 W R (A&T X) 123

⁵ *Kattyani v Soonderee*, 2 W R (A&T X) 60, *Moran v Anund*, 6 W R (A&T X) 35, *Munsoor v Bunoo*, 7 W R 282, *Catherine v Huro*, 8 W R 284, *Sham v Dwarka*, 19 W R 100

⁶ *Ram v Chunder*, 2 W R (A&T X) 74, *Gopal v Muthoor*, 3 W R (A&T X) 132, *Anund v Hills*, 4 W R (A&T X) 33, *Elahee v. Roopun*, 7 W R 284, *Ahmed v Golam*, 11 W R 432

onexplained Evidence also may be given of fraudulent conduct¹ on the part of land lords, as an element decreasing the amount of burden on the tenant. If during this period of twenty years the tenant was out of possession for a short time, on account of illegal eviction by the landlord and did not therefore, pay rent, such period will not be taken as a break.²

on

The presumption may be rebutted.

The presumption from twenty years uniform payment is rebuttable. It may be rebutted by the tenant's own evidence shewing creation of the tenure at the beginning of the lease at any time subsequent to the Permanent Settlement. *Proof of material variation of rent at any period before the twenty years* will also have the same effect. A decree in a suit instituted after the passing of Act X of 1859 declaring the tenure liable to enhancement, is also sufficient to rebut the presumption.³ But a decree passed in a suit instituted before the Act came into force, declaring liability to enhancement, has not the same effect.⁴

on

Effect of partition of a tenure

The partition of a tenure and the consequent apportionment of rent with the consent and approval of the landlord do not amount in the eye of law to a variation of rent.⁵ This is only the distribution of the same rent on different parcels of land which were originally considered as one single parcel. Neither would the abatement of rent on account of loss of land by diluvion or dispossession by title paramount or acquisition of

¹ Gyaram v Gooroo 3 W R. (A.C. \) 59

² Lateefunnissa v Poolia W R., Sp Vol 91 See also Harronnath v Chittramoney 3 W R. (A.C. \) 132, and Radha v Aghore 25 W R. 344
Rakhal v Sheikh 3 W R. (A.C. \) 69; Lander v Benode, 6 W R. (A.C. \) 37; Woodoy v Turine 11 W R. 495 See also Nuffier v Poolson 19 W R. 175 Harro v Gobind, 23 W R. 352.

³ Gobind v Hero 3 W R. (A.C. \) 10; Kallee v Rattan 11 W R. 571 See also Doorga v Dora, 20 W R. 243

Sahhomoni v Ganga, W R., Sp Vol (A.C. \) 52; Hills v Netra 10th 1 W R. 10. See also Kenaram v Ramcoomer 2 W R. (A.C. \) 17; Hills v Harolal 3 W R. (A.C. \) 135; Karee v Nabo 3 W R. (A.C. \) 53; Soodha v Ramgutter 20 W R. 419

land for public purposes, be considered as variation of rent, disentitling the tenant from getting the benefit of the statutory provision in his favour. The law, as contained in the Rent Act of 1859, was not distinct in its terms, but Courts of law gave effect to the true intention of the legislature, and the Bengal Tenancy Act has given effect to the case laws by inserting the words "rate of rent"¹ in section 50. According to these cases crystallised into the rule of law laid down in the Bengal Tenancy Act, uniformity in the rate of rent according to the local unit of the measure of land is enough to give rise to the presumption of permanency. But the effect of such a provision in the law necessarily entitled the landlord to raise the rent on account of increase in area. Such increase of rent without² an increase in the rate of rent does not prevent the operation of the statutory provision.³ The increase may be due to alluvial accretion, to encroachment by the tenant on the landlord's adjoining land or the land belonging to a stranger, the tenant dealing with it as a part of the holding, imperfection in the original measurement and causes of a similar nature. In such cases the Bengal Tenancy Act expressly provides for an increase of rent for an increase in area.⁴

Increase of rent on increase of area.

We have already seen that the existence of a grant, explicit or sufficiently intelligible in its terms, regulates in most cases the legal relations between the parties, and the law seldom interferes except where its general policy or the weakness of one of the parties renders its interference absolutely necessary. I need not repeat what the policy of the authors of the Permanent Settlement of Bengal was, and how that policy was abandoned in 1812,⁵

Policy of law in contracts of lease

¹ Act VIII of 1885, Sec 50, cl I

² *Gopal v Nobbo*, 5 W R (Act X) 83, *Moran v Anund*, 6 W R (Act X) 35

³ *Reazonissa v Tookun*, 10 W R 246, *Radha v Kyamutoollah*, 21 W R 401

⁴ Act VIII of 1885, Sec 52

⁵ *Ante* p 88

the proprietors being given free permission to enter into contracts of lease on any terms best conducive to their interest. Ignorance, poverty, fear of oppression, absence of independent advice—when these or some of these circumstances are always expected to exist in a class of men, such as the poor peasantry of Bengal in their dealings with their landlords the law has laid down definite rules declaring certain conditions in leases as unconscionable and void, even without evidence of weakness in the one party or exercise of undue influence on the other.¹ But those who take permanent leases belong generally to a class not very inferior in intelligence, local influence and power to those who grant such leases. The Bengal Tenancy Act has therefore provided— Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukurrari lease on any terms agreed on between him and his tenant.² We are not however to understand from this that any terms or conditions whatsoever will be binding between the parties. The general policy of law, and not merely the policy of the Anglo-Indian legislature, has occasionally to interfere.

Non liability to be ejected for non payment of arrears of rent, notwithstanding express words in a contract to the effect, is an incident of permanent tenures. The law unaffected by the provisions of the Bengal Tenancy Act, lays down that a condition³ for ejectment for non payment of rent is enforceable though the ejectment is capable of being enforced by the land lord, only if the tenant does not pay arrears and costs of suit within fifteen days of the decree.⁴ In cases where there

† Ejectment
for non
payment of
rent

¹ *Vide* Act VIII of 1835, Sec. 178; *Fry v. Lane*, 40 Ch. Div. 322.

² Act VIII of 1835, Sec. 179.

Lauder v. Benodlal & W. R. (A.C. 1.) 37; *Kadir v. Mohadeb* *Ibid.* p. 48; *Bekah v. Ramtanoo* *Ibid.* p. 64.

⁴ Act X of 1859, Sec. 78; Act VIII (B.C.) of 1869, Sec. 52. See also

is an absence of legislative enactment, courts have always exercised an equitable jurisdiction, in not enforcing such a penal condition as to ejectment.¹ The Bengal Tenancy Act has expressly laid down that "where a tenant is a permanent tenure-holder, he shall not be liable to ejectment for arrears of rent, but his tenure shall be liable to sale in execution of a decree for the rent thereof"² This rule applies to all cases whether there is a written lease or not

Conditions for ejectment for breach of any covenant in a lease has always been looked with disfavour, and opportunity has always been given for remedying the breach.³ If the breach of a covenant is of such a nature that it is easily susceptible of remedy, the penalty of forfeiture is not enforced.⁴ The Bengal Tenancy Act has laid down special rules restricting, as much as possible, the right of the landlord to eject on the breach of a covenant.⁵ No ejectment can take place except in execution of a decree, and no decree for ejectment can be passed unless the "landlord has served, in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and, in any case, to pay reasonable compensation for the misuse or

on
Ejectment
for breach of
covenant.

Akt IV of 1882, Sec 114, *Jan Ali v Nittyenund*, 10 W. R. (F B,) 12; *Kumla v Ram*, 11 W R 201, *Saroda v Nobin*, Marsh Rep 417, *Gujadhur v Naik*, 1 L R 8 Cal 528 See also *Sreeshteedhur v Doorga*, 17 W R 462, *Indur v Campbell*, 1 L R 7 Cal 474, *Savi v. Mohesh*, W R, 1864, (Akt X) 29

¹ *Mahommed v Prayag*, 1 L R 7 Cal, 566, *Duli v Meher*, 12 B. L. R 439, *sc*, 1 L R 12 Cal 439, *Mothoora v Ram*, 4 C L R 469

² Akt VIII of 1885, Sec 65 See also Akt VIII of 1885, Sec 10,

³ Akt VIII of 1885, Sec 155, cl (b), *Mumtaz v Grish*, 22 W. R. 376, *Mothoora v Ram*, 4 C L R 469, *Duli v Meher*, 12 B L R 439; *Mahommed v Peryag*, 1 L R 7 Cal 566 See also *Brojendro v Bungo*, 12 C L R 389, *Golabahe v Kootoob*, 1 L. R. 4. Cal 527.

⁴ Akt VIII of 1885, Sec 155, cl 4

⁵ Akt VIII of 1885, Sec. 89

breach, and the tenant has failed to comply within a reasonable time with that request." The court passing the decree is required to make similar provisions in the decree and to fix a time for the performance and extend the time at its discretion. Sections 111 and 112 of the Transfer of Property Act also lay down strict rules guarding as much as possible the interest of tenants and I think these rules apply to permanent tenures. The period of limitation for a suit based upon a breach of condition has been limited by the Bengal Tenancy Act to one year from the date of the breach.¹

Compensation for breach of contract.

In cases where the remedy lies in a grant of compensation what is the measure of compensation or damages? This is a question very difficult to answer, specially in a country where the judge has to perform the functions of the jury as well. Each case has also its own peculiarities, specially arising from the nature of the tenancy. If there is a condition in a lease that the tenant shall not excavate a tank without the written sanction of the landlord, the grant being permanent, the measure of damages cannot be the cost of restoring the ground to its former condition. It would be giving the landlord too much if he be paid the whole cost of restoring the state of things which existed before the wrong was done. The true measure of damages in such a case seems to be the extent to which the value of the landlord's interests in the land has diminished.² It may happen that the taking away of a part of the soil has improved the land instead of diminishing its value. In such a case the damages should be nominal, merely for the legal injury the landlord not having sustained any actual loss. Where the lease is permanent, the landlord's interest lies in the security for his rent and if the security is not impaired, he loses little by the breach of the covenant. In cases, however in which the lease

¹ AR VIII of 1835, Sec 155. AR VIII of 1835 Sch III Art. I

² Withan v Kershaw (1836) 16 Q B Div 613.

is not permanent and there is a reversion to the landlord, the matter requires to be considered in a different light

The law also looks with disfavour upon a covenant in a lease restricting the tenant's right of alienation X Covenant restricting alienation Section 11 of the Transfer of Property Act, which reproduces the English law on the subject, seems to indicate that such a covenant in a lease is valid as between the landlord and the tenant, notwithstanding that the tenure may be permanent. But Section 11 of the Bengal Tenancy Act, on the other hand, lays down without any reservation, that every permanent tenure is capable of being transferred and bequeathed in the same manner and to the same extent as any other immovable property. The section would seem to lay down that a covenant restricting alienation as inconsistent with the chief condition in the grant, and would reject it as incapable of being enforced. But whatever the true intention of the legislature may be, it is now settled law that, notwithstanding a condition in a lease taking away the power of the lessee to alienate his right, and making forfeiture a penalty, the condition is not enforceable against a purchaser, unless there is an express right of re entry in case of a breach of a covenant against alienation¹. Such a condition in a lease is also restricted in its operation, and applies only to voluntary alienations, and not to sales in execution of decrees or assignments by operation of law as in the case of bankruptcy. The right of a purchaser in execution cannot be defeated by such a condition in a lease².

Instances have occurred of cases of permanent *mukurrari* tenures being allowed reduction of rent, Reduction of rent

¹ Act VIII of 1885, Sec 11, *Nilmadhab v Narattam*, 1 L R 17 Cal 826, *Golak v Mathura*, 1 L R 20 Cal 273, *Tamáya v Timápá*, 1 L R 7 Bom 262, *Subbaráya v Krishna*, 1 L R 6 Mad 159, *Naráyan v Ali*, 1 L R 18 Bom 603

² 1 L R. 17 Cal 826

notwithstanding that the rent has been fixed permanently. But no deduction is allowed if there is an express stipulation to pay at the particular rate in spite of diluvion or decrease of land on any other account. In *Assarudi v. Soroisbala Debi*,¹ Sir Barnes Peacock, C. J., held that 'according to the ordinary rules of law if a taluqdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent, if the whole of the land be washed away, or of a portion of the rent, if a portion only be washed away.' Even a ptnidār has been held to be entitled to abatement.²

† Interpretation
of deeds.

The interpretation of instruments of lease is a matter of considerable importance in this country, where the art of conveyancing is almost unknown. Documents in the vernacular languages are generally drawn, even at the present day, by men who have little legal training. The intention of the parties is not unfrequently left in the dark and left to be gathered from custom or usage, as difficult to ascertain as any other fact depending for proof upon oral evidence of a highly conflicting character. These documents are apparently simple, but their very simplicity is sometimes a source of litigation and a puzzle to lawyers and judges. The difficulty of interpretation is not unfrequently enhanced on account of our ignorance of the language, the manners, customs, habits and usages of the people. Help from legal literature or lexicons is rarely available. There is thus a conflict of authorities as to the interpretation of deeds. It has however, now been settled that the words—'with your sons and grandsons in succession' '*putra pōstradi kramē*, i.e. from generation to generation or 'generations born of your womb successively enjoy the same' and words of similar im-

¹ Marsh Rep. 558.

² *Moulvie v. Mussumat*, 8 W. R. 504; *Ram Narayan v. Jayakrishna* B.L.R., Sup. Vol. 70; *Brajanath v. Hiralal* (B. L. R. (A.C.) 57).

port convey a permanent and transferable right. They convey an absolute right subject to payment of rent. If there are no words fixing the rent in perpetuity, the tenure becomes *maurusi*, but not *mukurrari*. It is not, however, essential that words indicating heritable interest or fixing the rent in perpetuity should always be in, in order to create *maurusi mukurrari* right. The intention of the parties may be drawn from surrounding circumstances and from local custom or usage. Not unfrequently, the name given to the tenure created connotes its incidents. A putni taluq, as we have seen, imports a permanent hereditary tenure. The word *talug* raises the presumption of a tenure being permanent. The *howlas* and *nimhowlas* of Bakhergunj are instances of names of permanent tenures. The words *mukurrari maurusi* or *mukurrari istemrari* indicate permanent tenures at fixed rent. But their Lordships of the Privy Council have said that the words "istemrari and mukurrari" do not "of themselves, denote that the estate granted is an estate of inheritance. Not that such an estate cannot be so granted unless, in addition to the above words, such expressions as "bafarzandan" or 'naslan bad naslan' or similar terms are used."¹ The use of the word *mukurrari*, without the word *maurusi*, has been interpreted as creating tenures, in some instances, for the life of the grantee only, in others of the grantee and his heirs in succession. The intention is drawn, not from the use of any particular words, but from surrounding circumstances. The intention has occasionally to be gathered from the context of the deed, as in leases of jungle lands the rent of which increases from time to time, until it reaches a fixed maximum.

¹ *Tulshi Pershad v Ramnarain*, 1 L R 12 Cal. 117, *sc.*, L. R 12 I A 205. See *Ameeroonissa v Hetnarain*, S D A., 1853, p 648.

Q The law of England occasionally applied.

In the absence of any written instrument of lease or express contract, the incidents of a tenancy are those laid down in the Regulations and the several Rent Acts, supplemented by custom and usage. The law of England when it accords with the rules of justice and equity, has occasionally been applied to cases where the statute law in India is silent, and where there is no proof of any custom or usage bearing on the question at issue.

† Hereditary tenures.

Maurusi tenures, which the Bengal Tenancy Act has called permanent, are, by the definition itself, ' heritable and which are not held for any limited time. ' They have most of the incidents of *maurusi mukurrari* leases, but the rent is enhanceable. Act V of 1859 made no provision as regards the enhancement of rent of these tenures, and courts of law had, accordingly, to rely upon custom. In dealing with dependent taluqs,² I have stated the grounds upon which enhancement of rent can be claimed by the proprietor of an estate and the same rules and principles are applicable whether the tenure is held directly under a proprietor of a revenue paying or revenue free estate, or whether it is a subordinate tenure. Instances of tenures purely *maurusi* are however extremely rare. The fact seems to be that where no contracts exist, there have been constant disputes between the holders of such tenures and the superior landlords as to liability to enhancement and in a large number of cases the tenants have escaped. The rent of dependent taluqs in some of the districts especially Rajshahi and Mymensing and of under tenures in some others, has been enhanced, but the enhancement has been so high that new cases of enhancement seldom arise. These heritable tenures were not always transferable.³ But the Bengal Tenancy Act has, as we have seen, made all permanent tenures capable of being transferred or bequeathed in the same manner and to

AQ VIII of 1885, Sec. 3 cl 8

² Ante p. 166

Unlanded & Munro's [un] 13 B L R. 124

the same extent as other immovable properties¹ In districts where that Act is not in force, and when the lease is not for *agricultural purposes*, but is a lease for the collection of rent, as all intermediate tenancies are, the Transfer of Property Act would be applicable, and section 108, clause (j) of that Act provides—"The lessee may transfer absolutely or by way of mortgage or sublease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease" The words I have quoted from the Transfer of Property Act are prefaced in the section itself by the words—"in the absence of a contract or local usage to the contrary"² So that the burden of proving non-transferability is on those who assert it The common law of the country, if I may use that expression, seems to be in favour of heritability and transferability of all classes of tenures, unless there is express contract legally enforceable or positive law prohibiting succession and transfer The opposite view has sometimes been taken, though there is no foundation for it. I think, however, the Transfer of Property Act, though not applicable in Bengal to tenancies for agricultural purposes, should be taken to express the rule of law applicable to all cases where there is no special or local law. The reported cases on the question of the onus of proof are not, however, quite in harmony³ with one another Intermediate tenures cannot be said to be leases for agricultural purposes within the meaning of section 117 of the Transfer of Property Act, as the purpose of the creation of such tenures cannot, from the very nature of the thing, be for cultivation of land by the lessees

¹ Act VIII of 1885, Sec 11

² Act IV of 1882, Sec 108

³ *Doya v Anund*, 1 L R 14 Cal 382, *Kripa v Durga*, 1 L R 15 Cal. 89, *Appa v Subbaanna*, 1 L R 13 Mad 60.

† Tenures at
fixed rent
only

Mukurrari, also known as *kāsimi*, tenures are always for the lives of the grantees and are dependent upon written leases. Not that such tenures could not be created by oral demise, but the universal practice was to have written instruments of lease though registration was not compulsory. The Registration Acts passed since 1864, practically did away with oral agreements of lease for any term exceeding one year, and the Transfer of Property Act requires that they should be by registered instruments.¹ The question in all cases of grants at fixed rent is therefore a question of the interpretation of instruments. Wherever the Transfer of Property Act applies, the law attaches certain incidents when the contract is silent, and when there is no local custom or usage preventing the operation of the law. Generally speaking, these tenures are alienable and not terminable without the consent of the parties. Leases for a term of years at fixed rent are *temporary*, and I propose to deal with them separately.

* Registration
in landlord's
office.

Registration in the office of the landlord is a peculiar liability attaching to all intermediate transferable tenures. By whatever names they go *talugs howlas, jotes mukurraris or maurasies*, if they are transferable by law custom or local usage every transfer or succession requires to be registered in the landlord's office, the penalty for non-compliance being in some cases very severe.² The leasehold interest belonging to A may be sold in execution of a decree against B if A claims by assignment from B, without giving legal notice of the assignment to the rent receiver of B. This peculiarity in the Indian law of landlord and tenant was considered in the case of *Sham Chand Koondoo and others v Broje Nath Pal Chowdhury and others*³ by a Full Bench of the

¹ Act IV of 1882, Sec. 107

² Act X of 1859, Sec 27; Act VIII (B.C.) of 1869, Sec. 26; Act VIII of 1885, Secs. 12 to 16

³ 21 W. R. 94 & 12 B. L. R. 454

Calcutta High Court In that case the learned judges held that the law, as understood before the Act of 1859 came into force, did not, in order to protect an assignee and under-tenants under him by service of notice of suit for arrears of rent, make the registration of the name of the assignee of a saleable tenure compulsory Registration was certainly known and was always insisted upon, but no penalty was attached to non-registration Regulation VII of 1799, known as the *Haptam* in Bengal, gave proprietors the right to bring tenures to sale for arrears of rent The Regulation further provided, as security to the zemindar, that dependent taluqdars should register in his sherista or office all transfers, as well as successions, of taluqs or portions of them¹ But, in the words of Sir Richard Couch, C J., in the Full Bench case, 'the Regulation does not provide, as Act X does in the proviso to section 106, that no transfer which is required to be registered shall be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector More stringent provisions in favour of zemindars are inserted in Act X of 1859 than in the Regulation It appears to me, taking sections 105 and 106 together with the proviso, that it was intended that the zemindar should be at liberty to treat, as the holder of the tenure and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer and sufficient cause for non registration In such a case, a zemindar might find that he had been suing the wrong person. Taking these sections together, I think that the zemindar, having obtained a decree for arrears of rent, is entitled to sell the tenure, and that the person who has obtained a transfer which he has not registered, and cannot show a sufficient cause for

¹ Reg VII of 1799, Sec. 15, cl 8

not registering it, is bound by the sale, and cannot set up a title which he has acquired by a previous sale." This liability of intermediate transferable tenures exists not only on voluntary sales but on sales in execution of civil-court decrees, and even in the case of an assignee of an insolvent taking under a vesting order¹

† Effect of non-registration.

This provision about registration in the office of the zemindar or superior landlord, contained in section 27 of Act X of 1859 and reproduced in section 26 of Act VIII (B C) of 1869, entailed a higher penalty for non registration than what would be the result upon the application of the law of hypothecation to *rent*. As we now understand the law and the procedure for foreclosure and sale of hypothecated immovable property, no foreclosure-proceeding, whether under Regulation XVII of 1806 or the Transfer of Property Act, nor a decree for sale under that Act, has any effect on a person having an interest in the property but not made a party to the proceeding or suit if his interest in such property arose before the institution of the proceeding or the suit. The right of puisne encumbrancers or assignees of mortgaged premises is not in the least affected, if they have no legal notice of the proceeding or suit on the mortgage². But the registration sections of the Rent Acts of 1859 and 1869 would affect, for want of registration, mortgagees of tenures as well as subordinate tenure holders in a suit against the registered tenant only. The personal liability of the registered tenant for rent continues so long as an assignee from him did not get his

¹ *Sham Chand v Brojo* 21 W R 94; *Lukhinaria v Khetter* 13 B L R. 146; *Surendro v Tincoori* 1 L R 20 Cal 217. See also *Rashbehary v Peary* 1 L R. 4 Cal. 346.

² *Chunder v Kishen*, 1 L R. 9 Cal 855

Syed Emam v Rajcootwar 23 W R 187; *Nanack v Telechdye* 1 L R. 5 Cal 265; *Dingopal v Bolakes* 1 L R. 5 Cal. 269; *Kohil v Dull* 5 C L R. 243; *Karumunnisa v Nilratna*, 1 L R. 8 Cal. 79; *Jagul v Kartik* 1 L R. 21 Cal. 116

name registered in the office of the superior landlord.¹ As regards the assignee himself, he had no legal status, though it was optional with the landlord to accept him as a tenant, and it was even held that he could not sue for possession after illegal eviction by the landlord.² Non-registration of name did not, however, make the assignee a trespasser—the assignee at once becomes a tenant.³ Fraud vitiates the most solemn transaction. A fraudulent decree or fraudulent eviction ought always to be a good cause of action against the perpetrators of the fraud. It is impossible to conceive that any humane legislature would impose, for non-registration, the penalty of forfeiture, or the severer one of negating the existence of the relationship of landlord and tenant.

The hardship of this law was early felt by the judges, and every indulgence was shown to the tenants if they had made the slightest attempt to have their names registered in the zemindar's sherista. Recognition by receipt of rent, though the receipt was granted in the name of the old tenant, knowledge of the superior landlord of the assignment of the tenure under circumstances that would lead any honest man to recognize the assignee, or a long course of dealings with the assignee, used to be considered tantamount in law to registration. On the other hand, the landlord had the option of ignoring the old tenant and sue his assignee in possession. He could ignore a registered *benamdar* and sue the real tenant for rent. Suits for registration, on the refusal of the landlord to register, have always been allowed, the tenant being made to pay only the usual fee for registration.

Suits for Registration

On the death, however, of the registered tenant, a suit for rent against his legal heirs was considered insufficient in law to bind an assignee of the tenure. The registration-law was not stretched in favour of the land-

Death of the registered tenant.

¹ Kearnes v Bhowanee, W R, Sp Vol, 168

² Mooktakeshee v Pearee, 7 W R 158

³ Nobeen v Shib, 8 W R 96, Kristo v Raj, 1 L-R 12 Cal 24

lord, so as to deprive a stranger of his right by proceedings in a suit against a person who was never in possession and who had no connection with the property at the time when the succession opened out. Registration of successions is now required by the law.¹ No suit can be against a dead man, the landlord must, therefore, seek out the real tenant and sue him for rent. The same principle should apply in cases of survivorship under the Mitakshara law though a suit against the *karta* when he is alive, binds the co-parceners.²

The Bengal
Tenancy Act
on Registra-
tion.

Under the Bengal Tenancy Act, it is no longer the duty of the transferee of an intermediate tenure to ask for registration of his name to the sherista of his superior landlord,—it is now the duty of the registering officer, when he registers the assurance conveying a tenure or any interest in it to send notice to the landlord. Transfer of a permanent tenure either by sale, gift or mortgage, merely by word of mouth or delivery of possession, has now been abolished. A registered instrument is the only means by which a permanent tenure may be transferred.³ A fee for registration in the office of the landlord is now levied by the Registrar himself and it is the duty of the registering officer after levying the fee, to send it to the Collector with a notice of the transfer and the registration of the assurance and it is then the duty of the Collector to cause the fee to be paid to, and the notice to be served upon the landlord. The fee is two per cent⁴ on the annual rent, provided the total amount of fee shall not exceed one hundred rupees and where no rent is payable, the fee is two rupees only. The duty of the original tenant and his assignee which the former law imposed upon them has now devolved on Government officers.

Act VIII of 1885, Sec. 15.

Jesal & Gunga, I L. R. 10 Cal 995.

Act VIII of 1885, Sec. 12, sub-sec. 1.

⁴ Act VIII of 1885, Sec. 12, sub-sec. 3.

and whether the superior holder receives the fee and the notice or not, the liability of the previous tenant for rent accruing subsequent to the date of the registration ceases, and the landlord is bound to look to the new tenant for the rent for such subsequent period

On a sale in execution of a decree other than a decree for arrears of rent, or on a decree for foreclosure being passed, the Court has to perform a similar duty, *i e*, to levy the fee from the purchaser or mortgagee entitled to possession, and transmit it with a notice through the Collector¹. But no fee is levied nor any notice sent to the landlord, when the sale is brought about by the landlord himself for arrears of rent, or when the landlord himself is the purchaser

o Registration on execution-sales

Under the law, as it stood under the Rent Acts of 1859 and 1869, the registration of successions was necessary, but there was no penalty for non-registration. A suit for arrears must be brought against the heir or successor of the deceased tenant, whether registration of his name was effected or not. The Bengal Tenancy Act has imposed a penalty, taking away the right of the heir to sue his under-tenants for rent, or get any relief as against them until he pays to the Collector the landlord's fee, and until the notice of such succession is given to the landlord². But if the succession had opened out before the Act came into force, registration of succession would be unnecessary³. The provisions of the law applicable to assignees and heirs apply to transfers of or successions to shares in a permanent tenure. But the landlord is not bound to accept a sharer as his tenant with respect to that share. He becomes only one of the joint tenants liable to be sued along with the others as joint tenants⁴.

X Registration of successions

If due effect be given to these provisions of the Bengal Tenancy Act, and the officers entrusted with the

† Remarks

¹ Act VIII of 1885, Sec 13

² Act VIII of 1885, Sec 16

³ Profulla v Samiruddin, I L R 22 Cal 337

⁴ Act VIII of 1885, Sec 88

task of causing notices to be served cause them to be properly served, both the landlord and the tenant are likely to derive considerable benefit. The Act, however, is silent as to any but permanent tenures. As we have seen there are a good many tenures which are not permanent. The law has also made no provision for involuntary transfers as on survivorship or insolvency. It has made no provision for unregistered transfers and successions that had taken place before the Act came into force. What is the landlord to do in those cases in which the law is silent? What also is the position of the tenant in occupation whom the landlord does not recognize? It would seem that in these cases the landlord must find out the tenant. He ought not to be allowed any relief by proceedings against the registered tenants—a benefit which the law, as it now stands does not allow him.

* Rights of
co-sharer

One amongst a number of co-sharers forming joint owners of a superior tenure has not the same rights as a sole owner or all the co-owners jointly. He cannot sue alone for the rent of his share except under peculiar circumstances. He cannot sue for ejectment or enhancement of rent. He labours under various other disabilities. The Bengal Tenancy Act following numerous rulings on the subject expressly provides that he cannot singly avail himself of the remedies which that Act gives to land owners in relation to their tenants.¹ It would therefore, seem that a suit by a co-sharer against a registered tenant ought not to bind any but the person sued. The High Court at Calcutta held in one case that a decree in such a suit has the same effect on a sale in execution of the decree as if the suit had been brought against the tenant in occupation.² But the law of landlord and tenant has now been changed as

AR VIII of 1885, Sec. 183; *Beni v Joad*, 1 L. R. 17 Cal. 372.
Jeo Lal v Guaga Perhad, 1 L. R. 10 Cal. 976.

regards the greater part of the Lower Provinces of Bengal, and it will not be necessary to consider how far that judgment correctly expounded the law

Intimately connected with the law about registration of the tenant's name in the office of the superior landlord is the especial procedure of sales for arrears of rent and avoidance of incumbrances. Shortly after the publication of the Proclamation in 1793 announcing the Permanent Settlement, the necessity of a law for the sales of tenures for arrears of rent was felt by the legislature. Punctual realization of revenue required punctual realization of rent by those who had to pay the revenue. In 1799, Regulation VII was passed for sales of dependent taluqs and other similar transferable tenures for realization of arrears of rent due in respect thereof. Act X of 1859, which vested in the Collectors the power of entertaining suits for rents and bringing tenures to sale, laid down specific rules of procedure for sales of tenures and under-tenures. The Bengal Act of 1869 made no alteration in the procedure or the substantive law. These Acts made two sets of provisions—one for sales at the instance of the sole landlord or a body of landlords jointly, and the other for sales at the instance of a co-sharer.

Special Procedure for sales for arrears

Process of execution could be issued against either the person or the property of a judgment-debtor, but the process could not simultaneously be issued against both the person and the property¹. Immovable property of the judgment-debtor other than the tenure in arrear could not be sold, till movable property was exhausted. The Bengal Tenancy Act has made a material alteration in the procedure in this respect, and a judgment-creditor is not now compelled to sell the tenure in arrear before attempting to enforce the decree against other immovable properties of the judg-

Simultaneous execution

¹ Act VIII (B C) of 1869, Sec 57

ment debtor. He is now entitled to realize the amount of the decree by attachment and sale of any property of the judgment-debtor movable or immovable. If, however, the contract between the parties contains a precise stipulation to the effect that the tenure should be first sold, and if after such sale there should remain a balance due to the landlord other properties of the tenure holder might be sold the decree should contain a direction for the sale of the tenure in arrear before the sale of the other properties of the judgment-debtor. If there is no express contract or no express direction in the decree it is optional with the decree holder to proceed to execute the decree in the mode best conducive to his interest.

✓ Sale proclamation.

A proclamation of sale of a transferable tenure for its arrears should contain amongst other particulars provided for in the Code of Civil Procedure the name of the village estate and *pergaoah* or other local division in which the land comprised in the tenure is situated the yearly rent payable and the amount recoverable under the decree.¹ Order for simultaneous attachment and proclamation may be made.² The old Acts required five notices of sale to be stuck up (1) at the Court house in which the sale is to take place (2) in the office of the Collector (3) in the office of the Judge of the district (4) on some conspicuous place on the land of the tenure and (5) on some conspicuous place in the town or village in or nearest to which the land is situated.³ The Bengal Tenancy Act however has dispensed with the publication of the notice in the office of the Collector and the District Judge, and the local government by Notification dated the 20th February 1886 has directed that the notice should be published

¹ Act VIII (B.C.) of 1865 Secs. 5 and 162; Act VIII (B.C.) of 1869 Sec. 60.

² Act X of 1859 Sec. 103; Act VIII (B.C.) of 1865, Sec. 4; Act VIII (B.C.) of 1869, Sec. 59.

³ Act VIII (B.C.) of 1865 Sec. 4; Act VIII (B.C.) of 1869, Sec. 59.

in the mal kutchery or rent office of the estate and at the local thanah¹ The non publication of any of these notices is a material irregularity, but is not in itself sufficient to make the sale a nullity The proclamations have to be served in the customary mode by beat of drum Under the procedure laid down in the older Acts² the hanging up of the notice in the court-house in which the decree is in course of execution must take place not less than twenty days before the day fixed for sale The Bengal Tenancy Act has, however, made an alteration in the period, by enacting that no sale shall take place until after the expiration of at least thirty days calculated from the date on which the copy of the proclamation has been fixed up on the land comprised in the tenure or holding ordered to be sold³ Under the Code of Civil Procedure, the period is at least thirty days from the date on which the copy of the proclamation has been fixed up in the court-house of the judge ordering the sale,⁴ and the Code also requires that the copy of the proclamation should be fixed up in the court-house after the service of the proclamation on the land ordered to be sold. Thus you see the alteration in the period made by the Bengal Tenancy Act has created an anomaly It agrees in the number of days with that prescribed in the Civil Procedure Code for ordinary sales in execution, but materially differs in the starting point. The infringement of this rule as to the time of the publication of the notice is only a material irregularity. The reported cases, however, are not quite in unison But the Calcutta High Court has been of opinion that this is merely an irregularity, and the judgment of the

¹ A&T VIII of 1885, Sec 163, cl 3 *Calcutta Gazette*, March 3, 1886, Part, I, p 142

² A&T VIII (BC) of 1865, Sec 4, A&T VIII (BC) of 1869, Sec 59

³ A&T VIII of 1885, Sec 163, cl (4)

⁴ A&T XIV of 1882, Sec 290

Privy Council in *Gopindalal Rai v Ramjawan Misser*¹ seems to have overruled all the cases which took a contrary view

Effect of sales
for arrears

The effect of a sale for arrears at the instance of the sole landlord or a body of landlords jointly, the sale taking place under the procedure stated above is to set the tenure free of all encumbrances and under tenures which might have been created by any act of the defaulter unless the right of creating such encumbrances was expressly vested in the holder by the terms of the grant or unless expressly assented to by any subsequent written authority of the superior landlord.² The power to avoid encumbrances and under tenures created by the defaulter is as we have already seen a necessary right for the security of the rent for which the tenure is hypothecated. Under the law, as it stands in districts where the Bengal Tenancy Act is not in force, the right to avoid encumbrances may be exercised at any time within the period of twelve years from the date of the confirmation of the sale. There are certain interests which are however, protected, such as the interest of khodkast rayats and occupancy tenants. The sale of a tenure for arrears is, however not necessarily a sale under the provisions of the Rent Act. The decree holder, even if he is the sole rent realiser may proceed to attach and advertise the tenure in arrear under the Code of Civil Procedure, as if he wants to execute a simple money decree. There is nothing to prevent him from doing so. Their Lordships of the Judicial Committee held in the case of *Doolar Chand Shahoo v Lalla Chabeel Chand*³ that it is always a question of intention and the intention is to be gathered from the proceedings and the certificate of sale. What passes when the sale is under the ordinary

¹ 1 L. R. 21 Cal. 70 & L. R. 201 A. 165

² Act VIII (B.C.) of 1865, Sec. 15. Act VIII (B.C.) of 1862, Sec. 66.

³ L. R. 6 I.A. 47

procedure prescribed in the Code of Civil Procedure is the right, title and interest of the judgment-debtor, and not the tenure in arrear. The construction of sale-certificates has given rise to considerable difficulties and consequent litigation.¹ In order to avoid these difficulties the High Court at Calcutta prescribed different printed forms for the proclamation of sale of a tenure and for the sale of the right, title and interest of judgment-debtors in it. The Bengal Tenancy Act has made a material alteration in the law for the avoidance of encumbrances, for the greater protection of holders of encumbrances and under-tenure-holders. The Act makes a distinction in the first place between protected and unprotected interests. Protected interests are defined in section 160 of the Act, and these are interests in land which the sale-laws, whether for revenue or rent, have always protected. Unprotected interests, again, are divided into two classes—registered and notified encumbrances, and ordinary encumbrances not so registered and notified. Section 161 of the Act defines registered and notified encumbrances to be “encumbrances created by registered instruments, of which a copy has, not less than three months before the accrual of the arrear, been served” under the provisions of section 176 of the Act and in the manner prescribed by Rule 3 of Chapter I of the rules made by the local government.² The proclamation of sale of a tenure, when first published, is required to be for the auction-sale of the tenure subject to registered and notified encumbrances.³ If the final bid at the sale on such a notification is sufficient to liquidate the amount of the decree and costs, the tenure is sold subject to such encumbrances,⁴ but the purchaser acquires,

¹ *Dwarkanath v Aloke*, 1 L. R. 9 Cal 641

² Act VIII of 1885, Sec 161, cl. (b)

³ *Ibid*, Sec 163 (2) (a)

⁴ *Ibid*, Sec 164 (1)

the right to annul any encumbrances not registered and notified as aforesaid.¹ If however, the bidding "does not reach a sum sufficient to liquidate the amount of the decree and costs, the decree-holder may require that the final bid be not accepted and a sale free of registered and notified encumbrances do take place. A proclamation should then be issued, fixing a date of sale not less than fifteen or more than thirty days from the date of the postponement of sale"² On such a sale taking place the purchaser acquires the right to avoid all encumbrances including registered and notified encumbrances.

* Avoidance of encumbrances.

The encumbrances which a purchaser is entitled to annul do not become *ipso facto* void by the sale, but are only voidable at the option of the purchaser. In a Full Bench case decided before the Bengal Tenancy Act was passed the High Court at Calcutta held that on a sale, either for arrears of revenue or for arrears of rent, tenures and under tenures are not *ipso facto* avoided but are voidable only at the option of the purchaser.³ The principle laid down by the Full Bench of the High Court was adopted in the Bengal Tenancy Act, and in section 167 the legislature has provided that in order to enable a purchaser to avoid an encumbrance whether it is registered and notified or not, he must within one year from the date of the sale or if he had no notice of the encumbrance at the date of the sale within one year from the date on which he first has had notice of the encumbrance present to the Collector an application in writing requesting him to serve on the encumbrancer a notice declaring that the encumbrance is annulled.⁴ The encumbrance becomes annulled from the date of the service of the notice. A suit for possession

¹ Act VIII of 1885, Sec. 164 (2).

² Act VIII of 1885, Sec. 165 (1).

³ Titu v. Nobesh, 1 L.R. 9 Cal 683.

⁴ Act VIII of 1885, Sec. 167 subsec. 1.

against the encumbrancer must be brought within the usual period of limitation, namely, twelve years from the date of annulment ¹

Such being the consequences of a sale for arrears of rent on holders of under-tenures and mortgagees, persons interested in averting the sale have been given not only the power to pay in the amount of the decree and thus prevent the sale taking place, but there are also provisions for affording sufficient security for the amount thus paid. Bengal Act VIII of 1865, which supplemented the provisions of Act X of 1859, gave to under-tenure holders and other persons interested in the protection of any tenure or under-tenure from sale the same relief as section 13 of Regulation VIII of 1819 afforded to durputnidars and other persons similarly situated. Section 62 of Act VIII (B C) of 1869 reproduced the provision contained in the Act of 1865. The Bengal Tenancy Act allows any person, having an interest which could be voidable upon a sale for arrears, to pay into Court the amount requisite to prevent the sale. He has a lien on the tenure like a salvage lien—the amount being recoverable, with interest at twelve per cent per annum, as the first charge on the tenure. He is also entitled to take possession of the tenure and to retain such possession until the debt with interest thereon has been discharged ². But besides these remedies, a person paying the money into Court, whether as a person interested or a person making the payment lawfully, but under a mistake as to his interest, is entitled to get back the amount by an ordinary civil action, or he may deduct the amount so paid in satisfaction of his own debt ³. If he is himself the mortgagee, he may add the amount to the mortgage debt.

Remedies of under-tenure holders &c

¹ Act XV of 1877, Art 121

² Act VIII of 1885, Sec 171.

³ Act VIII of 1885, Sec 172, *Nobo v Srinath*, 1 L R. 8 Cal 877, *Lalit v Srinibas*, 1 L R 13 Cal 331. See also *Luckhi v Khettro*, 13 B L R 146

* Suit by one
of joint land
lords.

The right of one of a number of joint landlords, as we have seen, is that of an ordinary judgment creditor. The older Acts, following similar provisions to the laws for sales for arrears of revenue prescribed the ordinary procedure followed in execution of decrees for money, and not the special procedure in execution of decrees for rent, and such sales had the same effect even if the tenure itself were sold as the sale of any other immovable property sold in execution of a decree not being a decree for arrears of rent payable in respect thereof.¹ An additional restriction was put upon execution of decrees given in favour of sharers, as the tenure could not be brought to sale before the movable properties of the judgment debtor lying within the jurisdiction of the Court were exhausted. Act VIII of 1885 contains no special procedure on the point. Section 188 of the Act seems to imply that a co-sharer has not the right to sue for rent in the same way and under the same procedure as the older Acts enabled him to do. The High Court, following the old practice, has, however, allowed suits for rent to be entertained at the instance of one co-sharer only, if he has been separately collecting his share of the rent.² But an execution of a decree for arrears of rent due to a co-sharer is an execution under the Code of Civil Procedure only and not one under chapter XIV of the Bengal Tenancy Act. A suit for rent by a co-sharer must be treated as a suit upon an ordinary contract based upon the implied consent of parties the tenant agreeing to pay to one of his landlords a portion of the total amount payable by him. There is no reason why such a suit should not be entertained it being perfectly immaterial whether you call the amount claimed *rent* or register the suit in the *rent register*.

Act X of 1859, Sec. 108; Act VIII (B.C.) 1869, Sec. 64.

¹ *Jadu v. Sutherland*, 1 L. R. 4 Cal. 556; *Ganga v. Sreenath* 1 L. R. 5 Cal. 915; *Lodisal v. Gopee*, 1 L. R. 5 Cal. 931; *Obhay v. Hary* 1 L. R. 8 Cal. 377; *Prem v. Mokshoda*, 1 L. R. 14 Cal. 201; *Devi v. Jand*, 1 L. R. 17 Cal. 390.

Permanent tenures whether they are mukurrari or not, cannot be relinquished without the consent of the landlord, and the holder of the tenure cannot put an end to the contract at his own option. Notice to the landlord of an intention to relinquish cannot have the effect of determining the contract, which is a contract in perpetuity. X Relinquish-
ment

Tenures and under-tenures are partible by the civil court, but the partition does not bind the landlord.¹ On a partition amongst the landlords, the tenure is split up, and each co-sharer is entitled to consider the land allotted to him on partition as a distinct tenure. The rent is thus split up, and by such a partition one single tenure may be converted into a number of separate tenures. Thus, you see, a partition amongst the landlords is binding on the tenants, but the converse is not true. The effect of a partition of an estate under the Estates Partition Act is also the same. Partition

The acquisition of land for public purposes very frequently raises questions of considerable difficulty as to the apportionment of the amount of compensation between the superior and the inferior tenure-holders. Where the quantity of land acquired is appreciably large in proportion to the entire area of the tenure, abatement of rent is, as we have seen, a necessity for the benefit of both the tenure-holder and his rent-receiver. But in most cases, especially where the rent is fixed in perpetuity, abatement of rent is not sufficient to compensate the tenant's loss. The fundamental principle, which ought to guide us in all discussions as to the legal relation between the proprietor of the estate or the taluqdar or other superior tenure holder and the subordinate holder at fixed rent in perpetuity, is that the former is an annuitant and the latter is the real proprietor of the land. The security for the annual payment is all that the annuitant may fairly Acquisition of
lands for
public pur-
poses

¹ Act VIII of 1885, Sec 88. Act X of 1859, Sec 27. Act VIII (B C) of 1869, Sec 26. *Jadoo v Jadub*, 11 W R 294.

claim, if no abatement is allowed. If, however, abatement is allowed, he is entitled to the capitalized value of the amount of his annual loss. It is difficult to see how he can get any thing more, having parted with his proprietary right, reserving only an annual sum. But the reported cases on the subject of the division of the amount of compensation are not quite in harmony with one another. The facts and circumstances of each case have no doubt considerable weight in influencing the decisions of the judges, and inducing them to deviate from apparently well established and well recognised principles of law. In one of the oldest cases a case¹ decided under Act VI of 1857 the Sudder Dewani Adawlut said — 'The Zemindar and the Putnidar are entitled to compensation in proportion to the losses they respectively sustain from the appropriation of their lands and to the remission of the rents which they pay respectively to the Government or the Zemindar. In respect to remission, as the gross rental of the whole putni is to the gross rent of the land proposed to be taken, so will the entire putni rent be to the particular portion of rent to be remitted; and, with regard to compensation, the principle may just conveniently be stated as follows — As the gross profit of the putni is to the profit of the putnidar, so will the gross compensation be to the portion of the compensation the putnidar is entitled to recover.' These formulas are not, however, easy to work out² and if the zemindar has received a large bonus for the grant another element of uncertainty comes in and complicates the question. In *Rayekissory Dassee v Nilcant³ Couch, C.J.* after stating that the zemindar is only entitled to be compensated for

Sreenath v Moharaja, 3 D. A., 1860, p. 326. See Gordon v Moharaja, Marsh 490.

¹ See Moharajah v Bengal Coal Co., 10 W. R. 371.
20 W. R. 370.

the loss of annual rent he may sustain by an abatement, being allowed, but nothing, if there is no abatement, his loss being scarcely appreciable, lays down, "the proper mode of settling the rights of the parties is to give to the putnidar an abatement of his rent in proportion to the quantity of land which has been taken from him. The zemindar ought to be compensated for the loss of rent which he sustains, and the money ought to be divided between the parties accordingly. The putnidar's getting an abatement of his rent is to be taken into account, as partly the way in which he is compensated for the loss of the land." The rule here laid down is in accordance with the rule laid down by the *Sudder Dewani Adawlut* and agrees with the recognised principles as to the rights of the parties. The rule applies to apportionment as between tenure holders and under-tenure holders. The High Court at Calcutta, however, did not in two later cases¹ stick to the rule laid down above. In one of these cases, it was observed that the zemindar was entitled to something more than the mere capitalized value of the loss sustained by him in the shape of rent. It is difficult to see, however, why the zemindar should make a profit by the Government acquiring land. In later cases,² however, the High Court held that the under tenant was entitled to the entire compensation, no abatement of rent having been granted to the superior tenure-holder.

¹ *Godadhar v Dhunput*, 1 L R 7 Cal 585, *Bunwari v Burnomoyi*, 1 L R 14 Cal. 749

² Regular Appeals, Nos 271 & 272 of 1885 (unreported)

LECTURE VII

NON-PERMANENT TENURES

Temporary
leases not
dealt with in
the Regula-
tions

We have already seen what the policy of the earlier Anglo-Indian legislators was with reference to intermediate tenures¹—a policy which emanated not only from a desire to have the largest amount of security for the government revenue but also from an earnest desire to protect the weak peasantry of the country from the rapacity of revenue-farmers and other extortionate intermediate holders. The antipathy of Anglo-Indian statesmen against middlemen could not and did not last long but apathy took the place of antipathy and they were extremely slow to legislate for them. No effectual steps were until very lately taken to bring within positive rules of law questions about the rights and liabilities of farmers and other intermediate holders. Only one class of dependent taluqdars and other similar tenure-holders whose estates had been recognised at the Settlement were taken within the purview of Act X of 1859.² The Bengal Tenancy Act has only a few sections on permanent tenures,³ but it is practically silent on temporary or non permanent tenures. That Act is not a complete code of laws dealing with the relationship of landlord and tenant; it only amended and consolidated a portion of the law leaving the other portion to be drawn by the legal profession and judges from scattered rulings of the supe-

¹ *Ante* p. 141.
Act X of 1859, Sec. 15.

Act VIII of 1885 Chap. III

rior courts in India and legislative enactments of doubtful application.

There are, in the Bengal Provinces, a very large number of temporary lease-holders, intermediate between the actual cultivators of the soil—the *rai-yats*--and the proprietors of estates and permanent tenure-holders. The main sources of the law as to temporary leases are now the Indian Contract Act (IX of 1872) and the Transfer of Property Act (IV of 1882), and it is occasionally necessary to look to the law as administered in other countries, and especially in England, to find out, in the words of the Indian legislature, "the rules of justice, equity and good conscience"¹

Sources of law

I have already discussed² the question of the applicability of the provisions of Chapter V of the Transfer of Property Act to intermediate leases—leases not *for agricultural purposes* but *of agricultural lands*, the object of the lessee being not to cultivate lands and make profit by such cultivation like tea-planters or indigo-planters, but to profit by the collection of rent from rai-yats on the lands demised or by settlement of new rai-yats. The settlement of new *rai-yats* can hardly be said to be an use of land for *agricultural purposes*.

Act IV of 1882

Temporary leases of immovable property are known in the Bengal Provinces by various names, the term *ijara* being the most common, and the term *thika* being generally used in Behar. A sub lease granted by an *ijaradar* is called *dar-ijara*. Following the usual nomenclature, a lease taken from a *dar-ijaradar* is called *se-ijara*. *Mostajiri* is a word derived from the word *ijara* and is frequently applied to temporary leases in Behar instead of the word *thika*. The word *thika* in Bengal has not always the same signification, it being used in some districts, as in the Twenty-Four Pergannas, for permanent rai-yati interest and in others for tem-

Vernacular names of temporary leases

¹ Act XII of 1887, Sec. 37, cl 2

² Ante p 187

porary raiyati leases. A *sub-mostajiri* tenure is *dur mostajiri*, while the words *katkina* and *dur katkina* are used for inferior subordinate leases in Behar. Other terms are also used in connection with temporary leases. *Zuripeshgee* leases in Behar have the double character of a mortgage and a lease.

Before the Transfer of Property Act came into operation, leases of immovable property like conveyances of land could be effected by parol¹. Since the passing of Act XVI of 1864 the first Act that made registration of leases of immovable property for any term exceeding one year or from year to year compulsory — such a lease of immovable property, when effected by a written instrument, could be valid only if the instrument was registered but the Registration Acts did not make the execution of written instruments compulsory, and oral evidence could be adduced to prove a lease for any term. The existence of an instrument executed since the passing of Act XVI of 1864 if the instrument was unregistered would exclude oral evidence under the Evidence Act². So that in those days a lease for a term of years or from year to year could be valid if made by parol or by a registered instrument. The anomaly, however has been removed by the Transfer of Property Act³. Leases from year to year or for any term exceeding one year or reserving a yearly rent, can now be made only by a registered instrument⁴. Leases for a term of less than a year only may now be made by any instrument registered or not or by parol agreement.⁵

Meerza v Nawab 4 Sel. Rep. 168; *Sheikh v Sheikh* 1 B. L. R. (F B) 58, ac 10 W. R. (F B) 511; *Nural v Kohli* 1 L. R. 6 Cal. 534; *Chunder v Krishna*, 1 L. R. 10 Cal. 710.

¹ Act I of 1872 Sec. 91. Act IV of 1882 Sec. 107.

Act III of 1877 Secs. 18 (cl c) and 43; *Surendra v Bhai Lal* 1 L. R. 22 Cal. 752.

Act IV of 1882 Sec. 107.

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Void leases
and posses-
sion there-
under

An unregistered instrument of lease for a term of years or from year to year, executed before July 1882,¹ when the Transfer of Property Act came into force, is void, and so also a demise by an oral or unregistered lease for a similar period made since that date.² But if the tenant enters into possession under such a void lease, he becomes a tenant from year to year upon the terms of the contract, in so far as they are applicable to, and are not inconsistent with, a yearly tenancy.³ The lessee in possession under a void lease is liable for damages for use and occupation,⁴ the rent stipulated in the inadmissible contract of lease being the measure of damages. If the lessee has not entered into possession, he will not be liable for rent or damages, nor can he ask for possession by a suit. The practice of delivering possession to ijdars before the completion of the written instrument of lease was very common, and is not unfrequent even now. This is done by the issuing of a notice by the lessor to the village headmen and the raiyats, requiring them to pay rent to the lessee, such a notice being called an *amalnama* or *amaldastak*. An *amaldastak* given as a preliminary to a formal lease has never been considered to be equivalent to a lease⁵, and creates no title whatever. It is retained by the lessee as evidence of the contract of lease and of delivery of possession. Under the present law, an *amalnama* cannot be used as evidence of a lease for a term of years, but the delivery of possession evidenced by the instrument may be treated as creating a lease

¹ Shaikh v Abdool, 9 W R 425, Puroma v Prollad, 12 W R 289

² Surendra v Bhai, 1 L R 22 Cal 752

³ Woodfall's Law of Landlord and Tenant, 14th Ed, pp 102, 133, 137 and 570, Walsh v Lonsdale, L R 21 Ch D 9. But see Surendra v Bhai, 1 L R 22 Cal 752

⁴ Puroma v Prollad, 12 W R 289, Lukhee v Sumeer, 21 W R 208

⁵ Munshi Khadim v Forlong, 3 R J P J, 327

from year to year, terminable upon proper notice to quit.¹

dm
Agreement
for a lease.

An agreement for a lease to be executed in future is not required to be in writing but if there is a written contract, the registration of it is compulsory.² An agreement merely creates a right to obtain another document, which will, when executed create an interest in immovable property.³ But an agreement for a lease of immovable property is required to bear the same stamp under the Indian Stamp Act (I of 1879) as a lease,⁴ and as registration is compulsory, it has no advantage in saving any stamp duty, and is in most cases, dispensed with. If however one is executed, it may be enforced by a decree for specific performance.⁵ If the agreement is registered as it must be in order to be admissible the tenant holding under it is not a tenant from year to year only but a tenant holding under the lease itself.⁶ An agreement for a lease, however, does not of itself entitle the lessee to obtain possession. Relief on an agreement may be had under the rules and in the manner prescribed in the Specific Relief Act (I of 1877).

dm
Who may
grant leases.

Every person competent to contract and entitled to transfer immovable property is also competent to grant a lease for any term of years co-extensive with his own dominion over it,⁷ and every agent of such person duly authorized in that behalf, may also

See *Syed Sulfar v Amrad*, I. L. R. 7 Cal 703.

¹ Act III of 1877 Sec. 3 (Definition of lease). *Bhalrab v Kishori*, 3 B. L. R., App 11; *Bunwaree v Sengam* 7 W. R. 280.

² *Syed Sulfar v Amrad*, I. L. R. 7 Cal 703.

Act I of 1877 Sch I Art IV

Parker v Taswell, 27 L. J. Ch 812

Walsh v Lonsdale L. R. 21 Ch D 9. *In re Mangham* L. R. 14 Q.B.D. 958; *Althausen v Brooking*, L. R. 26 Ch. D 565; *Coatsworth v Johnson* 55 L. J. Q. B. 220

Act IV of 1882 Sec. 7

do the same¹ A lease is a mode of transferring property for a term, and is nothing but a conveyance of the property let out for the term mentioned in it, subject to the payment of rent and the other conditions and covenants contained therein A person, having full power of alienation, may grant a permanent lease or a lease for any number of years, and for any premium, and at any rate of rent as he chooses

A *karta* or manager of a joint family, governed by the Mitakshara law of inheritance, is competent to grant a lease on any reasonable conditions, best conducive to the interest of the joint family, the restrictions being almost the same as those on his power of alienation He is in the position of an agent of the corporate body of which he himself is a member² Under the Bengal school of Hindu law, a *karta* of a joint family has much the same powers, and though the shares of the different members are, in the eye of law, ascertained or always ascertainable, authority in him is generally presumed, though he is bound to exercise that authority as a prudent owner.³ Under the Mitakshara law, a lease granted by one member, even though he may be the *karta*, may be absolutely void, even as regards the grantor, if the conditions are such as a prudent owner would not agree to, but in Bengal, a lease under similar circumstances may be valid to the extent of the share of the grantor himself⁴

Managers of
joint families

Permanent leases of endowed properties, both under the Hindu and Mahomedan laws, are void, except under very peculiar circumstances, but a *sevaet* or a *mutwalli* may grant temporary leases on reasonable conditions and for reasonable terms of years, and

Sevaets and
Mutwallis

¹ Act IX of 1872, Sec 226, *Hamilton v Earl*, 1 Bro P C 341; *Ridgway v Wharton*, 3 De Gex, M & G 677

² Mayne's Hindu Law, Sec 320, 4th Ed

³ *Brojo v Luchmun*, W R, 1864, 83, *Muddomutty v Bamasoodary*, 14 B L R 21

⁴ 1 W Mac N 5, *Ram v Mitterjeet*, 17 W R, 420, *Macdonald v Lalla*, 21 W R 17 See also *Hunooman v Mussumat*, 6 M I A 393

his successor in office will be bound by his acts, the question really being one of necessity and prudence.¹ The power of a *mohunt* of a public *muth* is also similarly restricted. Trustees of charities have similar powers to grant leases for the due administration of the trusts.

5m Guardians of
Infants.

The power of a *de facto* guardian of an infant to grant leases is, necessarily, of a limited character. He can act only for the benefit of the infant but if he exceeds his power, the lease granted by him may be avoided in the same way as any other contract made by him.² If it is not for the infant's benefit, the lease is voidable but it is not absolutely void. The infant on attaining majority, or if he dies under age his heir may avoid the same. If the *de facto* guardian be removed, the person who succeeds him may also avoid the lease. The authority of a guardian appointed by a civil court under Act XL of 1858 or the Guardian and Ward's Act (VIII of 1890) is limited to grants of temporary leases for any period not exceeding five years unless the grant is made under sanction of the court appointing him.³ The power of a manager under the Court of Wards is also similarly restricted. The Court of Wards (the Board of Revenue) may, however direct the grant of leases for any term under the rules laid down in the Court of Wards Act.⁴ Whether the infant on attaining the age of majority is bound by a grant made by his guardian or the Court of Wards is a question the answer to which depends upon the circumstances of each particular case.

¹ *Radha v Juggut*, 4 S D A 151 (192); *Maharane v Motkora* 13 M I A 270; *Juggeisar v Rajah* 12 W R 299; *Tahboonliya v Koomar* 15 W R 228; *Arrath v Juggurnath* 18 W R 439; *Bauwarce v Mudden*, 21 W R 417.

Lalla v Koonwar 10 M I A 454; *Oddoyto v Prasanno* 2 W R 325; *Nabo v Kalee* S D A (1859) 607; *Gopee v Ram* *Ibid* 913; *Deboo v Robert*, *Ibid* 1575.

² Act VIII of 1890, Sec. 29, cl 6; Act XL of 1858, Sec. 18; *Orl v Sabodra* 1 L R 2 Cal 253.

Act IX (BC) of 1879, Sec. 18.

If the guardian or the manager under the Court of Wards has acted within the powers given him by the law, the infant, when he attains majority, can set aside the lease on proof of fraud, the onus of proof being upon him ¹. Even if the sanction of the court were obtained in the manner prescribed by law, the infant may shew that the sanction was obtained by misrepresentation or fraud.

Hindu widows and females enjoying what is known to be the *widow's estate*, have the same limited powers in granting temporary leases as in dealing with their properties in other ways. The test is *necessity*. A lease granted by a Hindu widow terminates with her death, even if her death takes place at the middle of a year of the lease. The after-taker is entitled to take possession at once, but the lessee may protect himself by showing that the lease was for necessary purposes, granted for the protection of the estate or improvement of the property demised, and he may then be allowed to hold on till the end of the term. If, however, the lease is such that prudential considerations only induced the widow to grant it without actual necessity, and if it be not a burden on the estate, the lessee ought to be allowed to hold on till the end of a year of the lease ².

Hindu
widows

The case of mortgagors granting leases is very common in this country, notwithstanding the covenant, generally to be found in mortgages, prohibiting such grants. A covenant in a mortgage, restraining alienations by a mortgagor, merely creates a personal liability, but does not render a lease granted by him void and inoperative ³. A temporary lessee from the mortgagor is a necessary party in a suit upon the mortgage, and if the decree is not passed in a suit properly framed, the decree

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Mortgagors

¹ *Sikher v Dulpatty*, I L R 5 Cal 363. In the matter of the petition of Shrish Chunder Mookhopadhaya, I L R 6 Cal 161.

² *Loll v Hurre*, 1 Marsh 113.

³ *Ali v Dhirga*, I L R 4 All 518. *Venkata v Kannam*, I L R 5 Mad 184, *Radha v Monohur*, I L R 6 Cal 317.

does not bind him. The purchaser on a sale under the mortgage is not entitled to possession, evicting the lessee¹ if the lessee has not been made a party to the suit.

Interpreta-
tion of leases

Difficulties occasionally arise in the interpretation of deeds. The intention of parties must be gathered from the written instrument taken as a whole. Ambiguities and omission of material and necessary covenants are frequent sources of litigation. Parol evidence of circumstances existing at the time of the execution of the lease, and evidence of custom and usage may be given to explain ambiguities and supply the absence of material covenants. The description of the property demised is occasionally a source of litigation but well known local divisions such as villages and *perganahs*, defined by *Thak* and Survey maps and *monsawar* registers generally help us in finding out with sufficient exactness the property demised. Where the lease is of land lying within specified boundaries the estimated area is not the test of what is really conveyed.² Evidence may be given of the names used generally by the people and the names used during a long course of years by the lessor himself in his *zemindari* books and *zemindari* papers previous to the lease. When any technical word is used evidence may be given to show its meaning.³

When leases
begin to
operate.

A lease like most other grants begins to operate from the date of its execution entitling the lessee to have possession and the lessor to have rent⁴ unless a contrary intention appears from the words used in the instrument. The inartistic way, however in which leases in the vernacular languages are generally drawn, leaves out in many instances the dates of the commencement of the leases. The beginning of the agricultural year or of

¹ *Held v. Doll*, 5 C. L. R. 243; *Dir Gopal v. Balakrishna* 1 L. R. 5 Cal. 269; *Jugal v. Kartic*, 1 L. R. 21 Cal. 216.

² *Shree v. Brojanath* 14 W. R. 301; *Karee v. Burda* 15 W. R. 374.

³ *Woodfall on Landlord and Tenant*, p. 141.

Underwood v. Horwood, 10 Ves. 209.

the year according to the local calendar is considered, in such cases, to be the time whence the lease begins to operate and is calculated to supply the omission in the written instruments. The custom in each locality and the convenience of the parties in the collection of rent from the rayats on the land, are, also, to be taken into consideration ¹. If the lessor has not collected from the rayats rent from the beginning of the month of Baisakh in districts in which the Bengali year prevails, and the lease is executed in one of the earlier months, a presumption arises that it was the intention of the parties that the lease should operate from the first day of Baisakh of the current year. If the lease has been executed at the middle of the year or later, and the landlord has received from the lessee rent from the beginning of the year at the time of the execution of the instrument, the lease should be considered to have retrospective effect. So in the province of Behar, the presumption, in similar circumstances, will be, that the lease has begun to run from the beginning of the month of Aswin. But the express covenants in a lease cannot be controlled by custom. Evidence of the custom of the country or locality may be given to fix the time, only if the lease is entirely silent ².

It is not necessary, in order to give validity to a lease, that the lessor should be in possession at the date of its execution or be capable of giving possession to the tenant at once. A lease to commence upon the expiration of a previous lease, or on the happening of a contingency is good in law and may be enforced ³. An agreement to grant a lease or a lease itself, executed by a person who is out of possession and who is litigating or intends to litigate for possession, with the help of the person who has taken or has agreed to take the lease,

Present possession not necessary

¹ Wigglesworth v Dallison, 1 Dong 201, *sc*, 1 Smith's L. C. 598

² Webb v Plummer, 2 B & A 746

³ Pitchakutti v Kamala, 1 Mad H. C. 153

though the transaction is champertous, is not illegal in India and may be enforced. A covenant in a lease to grant a new lease on the same terms on the expiration of a subsisting lease, is good and covers all the covenants except the covenant for renewal. But if the stipulation to renew the lease is coupled with conditions to be performed by the lessee and the lessee fails to perform the same, the fact of the landlord allowing the tenant to hold over does not affect the landlord's right to resume possession after due notice.

1) livery of possession

The lessor is bound at the lessee's request to put him in possession of the property. If the lessor fails to deliver possession the tenant is not bound to pay rent as rent is payable only for the use and occupation of the land. The failure of the lessor to point out the land or to give proper notice of attornment to the raiyats or any defect in the lease which incapacitates the lessee from recovering rent from the raiyats in occupation is a good ground for absolving the lessee from liability to pay the rent reserved in the contract of lease.

Rate of rent

The omission of words fixing the rate of rent or the insertion of words for the ascertainment of rent on measurement raises questions of construction. If the rate of rent is not mentioned the rent previously paid for the land or the total amount of collection less a reasonable percentage for collection-charges should be considered as the annual amount agreed to be paid. In a suit for provisional rent there being a condition in the lease for measurement or ascertainment of the rent roll

Chedambara v Renja 13 B L R. 509; 22 W R 149; L R 11 A 24; *Abdool v Doorga* 1 L R. 5 Cal. 4

¹ *P & O S. N. Co v Konboy* 2 Hyde 217

Fokeeroonissa v Chunder 12 W R. 539

AG IV of 1882 Sec. 108 cl (b) *Manee v Campbell* 11 W R. 279; 12 W R. 149 *Radhansih v Jay* 2 C L R. 302.

AG VIII of 1885, Sec. 3, s. 5; *Hurib v Mohinee* 9 W R. 582; *Bell v Lalit* 3 B L R. App., 119

by local investigation, the defendant may plead that he is not bound to pay the provisional rent and may ask that the rent may be ascertained. But until ascertainment, the landlord is entitled to receive the provisional rent.¹ Assessment for excess land, according to a contract of lease, need not necessarily be made in a suit for the purpose, it may be made in a suit for arrears of rent.²

The landlord is not only bound to deliver possession, but to do every thing in his power to keep the tenant in quiet possession during the continuance of the tenancy.³ Eviction by title paramount causes suspension of rent.⁴ But if the eviction be the effect of a mere trespass, the lessee is not excused from the payment of rent, as in such a case the lessee is entitled to recover possession and damages from the trespasser.⁵ If the lessor has no title, the lessee has no remedy against eviction by title paramount, and the landlord's right to rent ceases with the cessation of the tenants' possession. "According to English law," as expressed by Peacock, C J, in *Gopanund Jha v Lalla Gobind Pershad*,⁶ "if the lands demised be evicted from the tenant or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such

Eviction of lessee by title paramount

¹ *Bharuth v Bepin*, 9 W R 495

² *Ram v Gumbeer*, 19 W R 108, *Ramjan v Amjad*, 1 L R. 20 Cal 903

³ Act IV of 1882, Sec 108, cls (b) and (c).

⁴ *Braja v Hira*, 1 B L R, A C, 87, *sc*, 10 W R 120, *Bullen v Lalit*, 3 B L R App 119, *Gobind v Munmohun*, 14 W R 43, *Musst Hoymobutty v Sreekishen*, 14 W R 58, *Gobind v Kristo*, 14 W R 273; *Kristo v Koomar Chunder*, 15 W R 230; *Douzelle v. Girdharee*, 23 W R 121

⁵ *Woodfall's Landlord and Tenant*, p. 425. *Hunt v Cope*, Cowp 243, *Rung v Lalla Roodur*, 17 W R. 386, *Chunder v Juggut*, 22 W R. 337; *Tarini v Gunga*, 1 L. R 14 Cal 649, *Obhoya v Koilash*, 1 L. R 14 Cal 751

⁶ *Gopanund v. Lalla*, 12 W. R 109. See also *Kadumbinee v. Kasheethath*, 13 W R 338, *Gobind v Munmohun*, 14 W. R 43, *Massamat v Sreekishen*, 14 W. R 58, *Dhunput v. Saraswati*, 1 L. R. 19 Cal. 267

eviction." Complete eviction by a landlord himself it is needless to add causes total suspensio of rent.¹

Eviction from
a part.

Where the lessee is evicted from a part of the lands by a stranger who has a title superior to that of the lessor, he has to pay to his landlord only a ratable proportion of his rent for the land that remains in his possession.² If a part of the lands be destroyed by an act of God, as by the action of a river, the same effect would follow, and the tenant will be bound to pay only a ratable proportion of the rent. But if the tenant be evicted from a part of his lands by the landlord himself, his assignee or any person claiming through him, the question of abatement is one of a little difficulty. In the case of *Gopannud Jha and others v Lalla Govinda Pershad* already cited³ the tenant defendant had been evicted under a title paramount from two out of a number of mouzas held by him under a lease, and Peacock, C. J., gave a decree to the plaintiff landlord, for a proportionate amount of rent according to the quantity of land in the possession of the lessee. His Lordship in the course of the judgment, quoted as apparently applicable to this country, the following passage from Bacon's Abridgment—"Where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry and it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the law, he ought to protect and defend."⁴

¹ *Morrison v Chadwick* 7 C. B., 266; 6 D. and L. 567. See *Dhunput v Mahomed Hasim*, 1 L. R., 24 Cal. 296.

Gopannud v Lalla, 12 W. R. 109; *Imambandi v Kamalwar*, 1 L. R., 21 Cal. 1005.

Bacon's Abridgment Tit. Rent (M). See also Smith's Law of L. & T., p. 287 Edition II; *Morrison v Chadwick* 7 C. B., 266 and ante p. 217 note 6.

This suspension of the whole rent is a sort of punishment, as a dispossession of a proportionately small parcel of land, from a mistake or misapprehension, may make the landlord lose the entire rent. In a country like India, where land is plenty, waste and unoccupied lands lying on the border between adjoining estates are common enough, and where demarcation by fences and pillars is little known, this stringent rule may cause serious injury, and it would appear to be inequitable and unjust to deprive the landlord of the entire rent. The judges in this country are not bound to adopt the rules of Common Law, prevailing in England, and I hope that in any future case that may arise the dictum of Sir Barnes Peacock, which is an *obiter*, will be reconsidered. In England, the rule of law as to the suspension of the whole rent is guarded by conditions, and is allowed to operate under peculiar circumstances only. It is doubtful, whether, even in England, the rule would be applied to cases of permanent leases at fixed rent, which partake more of the nature of out and out sales of land and less of ordinary leases, though according to the definition of *lease* given in the Transfer of Property Act (IV of 1882), permanent tenures are leases¹.

9 There is no suspension of rent, if the eviction by the landlord has followed upon some wrongful action of the lessee. If the lessor enters by virtue of a power reserved,² there is no suspension of rent. Even if the power to enter reserved to the landlord be exercised in a way not strictly regular, there will not be entire suspension of rent. In the case of *Rani Swarnamayī v Shashimukhi Barmani*,³ a putni sale, under which a purchaser under Regulation VIII of 1819 had evicted the defendant and taken possession of the taluq,

Eviction for wrongful action of lessee.

¹ Act IV of 1882, Sec 105. ² Woodfall's Land and Ten, p 425.

³ 2 B L R., P C, 10, sc, 12 M I A 244. See also Dhunput Singh v. Saraswati, I. L R 19 Cal 267.

was set aside for irregularity in the service of notice of sale proclamation. In a subsequent action for rent for the period including the period of dispossession, the Privy Council held that the zemindar could not be said to have committed an act of trespass, because she had pursued the remedy which the law allowed. The mere inadvertence resulting in the omission of one of the formalities prescribed by the Regulation was considered sufficient to deprive her of her remedy for rent—and it could not be said that the plaintiff was taking advantage of her own wrong. The principle laid down in this case may well be followed in cases where the dispossession of a part of the leasehold property is the result of mere inadvertence or mistake.

Disturbance
of lessee's
possession.

If the lessor enters as a mere trespasser, but the lessee be not actually evicted there will be no suspension of rent.¹ It is only on actual eviction that suspension of rent may take place. But if there is substantial interference with the tenant's enjoyment of the property though there may not be actual eviction, the trespass by the landlord may cause suspension of rent.² An action for damages may lie in case of trespass, as also in the case of partial eviction. Where possession by an ijaradar or lessee is by collection of rent, and if he is once properly in possession, the raiyats having attorned to him, eviction is not an easy matter. Payment of rent to a trespasser does not amount in law, as administered in this country to dispossession of an ijaradar during the term of his lease. He may sue the tenants for rent, even if they have voluntarily paid rent to a trespasser.³

¹ Hunt v. Cope, 245; Newton v. Allin, 1 Q. B. 517. See Douelle v. Girdharree, 23 W. R. 121; Tarial v. Guoga, 1 L. R. 14 Cal. 639; Obhoya v. Hollish, 1 L. R. 14 Cal. 751.

² Upton v. Townsend, 17 C. B. 361; Edgo v. Boileau, L. R. 16 Q. B. D. 1171; Neale v. Mackenzie, 1 Keen 474; Kadambinee v. Kashinath, 13 W. R. 338; Kristo v. Koomar Chauder, 15 W. R. 230.

³ Tarial v. Guoga, 1 L. R. 14 Cal. 639; Sarbananda v. Prassadhar, 1 L. R. 15 Cal. 537; Abhayasari v. Shidherwar, 1 L. R. 16 Cal. 313.

Otherwise it will rest with the tenants in actual occupation of the land to select their landlord, and change the landlord as often as they like

Encroachments made by a tenant during his tenancy upon the adjoining land of his landlord are *prima-facie* for the benefit of the tenant during the term, and afterwards for the benefit of his landlord, unless it clearly appears by some evidence that at the time they were made, the tenant intended to use the lands for his own exclusive benefit, and not to hold them as a part of the property leased ¹. Strong evidence is necessary to rebut the presumption in favour of the landlord. Speaking of this presumption in favour of the landlord, Markby, J., says—"In India where there is a great deal of waste land, and whose quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule * * *. If an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful," and his Lordship adds—"that in practice encroachments made by a tenant are not considered as held by him absolutely for his own benefit against his landlord" ². Encroachments being thus for the benefit of the landlord, the landlord may, after the determination of the lease, recover the encroached lands together with and as part of, the land let out ³. A separate suit may lie for the recovery of the encroached lands within twelve years from the expiration of the term. Even during the term of the lease, however, the landlord may sue for separate possession, if the encroachments are without the landlord's permission, and no limitation

Encroach-
ment by
tenant on les-
sor's land

¹ *Kingsmill v Millard*, 11 Exch 313, *Earl of Lisburne v Davis*, L R 1 C P 259, *sc*, 35 L J, C P 193, *Whitmore v Humphries*, L R, 7 C P 1, *sc*, 41 L J, C P 43, *Andrews v Hailes*, 2 E & B, 349, *Gooroo v Issur*, 22 W R 246, *Nuddyarchand v Meajan*, 1 L R 10 Cal 820

² *Gooroo v Issur*, 22 W R, 246

³ *Andrews v Hailes*, 2 E & B 349

would run against the landlord merely because the lessee is in possession for twelve years¹ We have also seen that for the increase of area of land under such circumstances, the landlord may demand an increase of rent²

Encroachment on stranger's land.

Encroachments by a lessee upon the land of a third person enures to the benefit of the landlord, if the tenant holds the lands as a part of the tenure as he is considered to have made the encroachments not for his own benefit but for that of his landlord and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself³ But if it can be distinctly proved that the encroachments have been made adversely even to his landlord, twelve years' possession may give the tenant a separate title Land encroached upon by a tenant before the commencement of his tenancy of the adjoining land cannot, however, be recovered by the landlord⁴

Lessees can not acquire any right against lessor during lease.

During the continuance of the lease the lessee can not acquire any right in the lands demised that may be set up against the lessor after the determination of the lease He cannot acquire a right of occupancy⁵ by cultivating land whatever the length of time may be Neither can he acquire the right to hold on any land by erecting substantial structures on it⁶ or excavating tanks On the expiry of the lease, he is bound to deliver possession of the lands demised without the slightest abatement of the right which the landlord had

Guoroo v Issur 22 W R. 246; *Nuddyarchand v Meajan* L. L. R. 10 Cal 820

¹ *Ante* p. 139.

² *Kingsmill v Millard* 12 Ex. 313; *Andrews v Hallett* 2 F & d D 349; *Nuddyarchand v Meajan* L. L. R. 10 Cal 820.

Mears v Perrott, 4 C. & P. 230; *Dixon v Dwyer* L. R. 1 Ex 359; *see* 14 Wee Rep 836; *Lloyd v Jones* 15 M. & W. 350

Act VIII of 1885 Sec. 22, sub. sec. 3; *Mr Gilmore v Sreemant*, W. R., 1863 (A. R. N.) 77; *Woomanath v Koodan* 19 W. R. 177; *Ramesh v Mr Blany* 25 W. R. 347; *Raf Homel v Laidley* L. L. R. 4 Cal 957

Act IV of 1882 Sec. 108 cl (p).

at the date of the demise¹ He is entitled to remove the structures,² but if his actions have, in any respect, deteriorated the value of the land or any part of it, he is bound to pay compensation for the loss that may be sustained by the lessor on re-entry If a lessee ejects raiyats and takes *khas* possession of any land, he is not entitled to retain possession of such land after expiry of the lease, if he takes away earth from the land for the purpose of making bricks, the landlord may restrain him by injunction and may, at his option, sue for damages³ He is also not entitled to cut down and appropriate timber or fruit trees, unless he himself has planted them He cannot also appropriate any land as his rent free holding If, after the expiration of the lease and delivery of possession to the landlord, he claims to hold possession of any land comprised in the demised premises, under any title independent of the lease, the burden of proof is heavily upon him to show that such title exists, the presumption being against his having any independent right to any parcel of land⁴

Limitation which bars the tenant does not bar the landlord If the lessee negligently allows a third person to take possession of the lease-hold property or any part of it, and if such person acquires, by adverse possession for more than twelve years, a title, such title is good against the lessee only or his assignees or legal representatives, but cannot be pleaded against the landlord⁵ The landlord may bring a suit for declaration of his right during the continuance of his lease, but his

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Limitation
against land-
lord

¹ Act IV of 1882, Sec 108, cls (m) and (q)

² Act IV of 1882, Sec 108, cl (h)

³ *Kadumbene v Nobeon*, 2 W R 157, *Anund v Bissonath*, 17 W R 416, *Tarini v Debbarayan*, 8 B L R App 69, *Mr. Peter v Tarinee*, 23 W R. 298

⁴ *Ramsarun v Veryag*, 25 W R 554

⁵ *Womesh v Raj*, 10 W R, 15, *Krishna v Hari*, 1 L R 9 Cal 367, *Bissesuri v Baroda*, 1 L R 10 Ca 1 1076, *Sharat v. Bhobo* 1, L R. 13 Cal. 101

having the right to ask for declaration does not prevent his suing for possession, at any time within twelve years after the determination of the lease

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Payments made by lessee for lessor's benefit.

' If the lessor neglects to make any payment which he is bound to make and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor' ¹ This is in accordance with the well known principle of law, that a person is entitled to be reimbursed for payments made by him for the protection of his own interest, when the payment ought lawfully to have been made by another person ²

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Assignment of lessor's right.

On the assignment of the interest of the lessor or of any part of his interest therein, the transferee has all the rights of the transferor and all his liabilities ³ A notice ought, on such transfer, to be given to the lessee, otherwise the lessee shall not be liable to pay rent to the transferee, and any payment made *bona fide* by the lessee to the original lessor would be considered as good ⁴ Rent is considered as accruing due from day to day, and it is apportionable, between the original lessor and his transferee on the principle that it has so accrued ⁵ If the assignment is made at the middle of a month, the apportionment should be made like interest on money and as accruing from day to day, but the tenant is not bound to pay the original lessor and his transferee separately nor he may claim to pay the rent in one lump sum as the instalment falls due ⁶ When a part only of the property or a part only of the lessor's interest is assigned the apportionment of rent may be made by consent of all the parties

¹ Act IV of 1882 Sec. 108 cl. (2).

² Act IX of 1872 Sec. 62.

³ Act IV of 1882, Sec. 109

⁴ Act IV of 1882 Secs. 40 and 109; Act VIII of 1885, Sec. 72.

⁵ Act IV of 1882 Sec. 72.

⁶ Chattraput v. Grindley, 1 L. R. 6 Cal. 382.

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Act IV of 1832, Sec. 108, cl. (2)

² Act IX of 1872, Sec. 69.

³ Act IV of 1882, Sec. 102.

Act IV of 1832, Secs. 50 and 109; Act VIII of 1835, Sec. 72.

⁵ Act IV of 1832, Sec. 35.

Chattrapat v. Girdara, 1 L. R. 6 Cal. 352.

any covenant, but he can have execution against one only. A deed of assignment is necessary to be registered under the law for the registration of deeds.

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Covenants
running with
the land.

The assignee, however, is bound only by the covenants which *run with the land* and not the personal covenants of the original lessee.¹ Covenants that run with the land are *real i.e.*, annexed to an estate. Such covenants bind all persons who come into possession of the real property, either by operation of law or by act of parties.² In countries where conveyancing is a science and an art the word "assigns" is almost invariably mentioned in leases whether a covenant is implied by law to be real or expressly made so by contract. But in this country instruments in the vernacular languages do not, as a rule contain the word "assigns" and questions therefore may arise here as to what are the covenants in a lease which run with the land? All covenants implied by law run with the land and both the lessor and the lessee and their respective assigns are bound by them. A covenant to pay rent³ or taxes is essential to the existence of the lease and must run with the land. A covenant to maintain an embankment in use for protection against inundation is also an important one and is real.⁴ Conditions as to paying rent to the superior landlord of the lessor, to renew a lease, and to pay damages for not giving information to the police of the commission of an offence or for not supplying provisions to an army passing through the estate are other instances of covenants that run with the land. An express condition for re-entry on the breach of a covenant is also an instance of a *real* covenant. The rights and liabilities of the lessor and the

¹ See *Spencer's case* & *Smith v. L. C. Woodfall's Land, and Ten.*, (14th edition) p. 273.

² *Esp. N. P.* 290, *Woodfall's Land, and Ten.* (14th edition) pp. 167, 168.

³ *Parker v. Webb* 3 Salk. 5.

⁴ *Morland v. Cook*, L.R., 6 Eq. pp. 212 & 7 N., 37 L.J. Ch. 835.

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The assignee, however, is bound only by the covenants which *run with the land* and not the personal covenants of the original lessee.¹ Covenants that run with the land are *real* i.e., annexed to an estate. Such covenants bind all persons who come into possession of the real property, either by operation of law or by act of parties.² In countries where conveyancing is a science and an art, the word "assigns" is almost invariably mentioned in leases, whether a covenant is implied by law to be real or expressly made so by contract. But in this country instruments in the vernacular languages do not as a rule, contain the word "assigns" and questions, therefore, may arise here as to what are the covenants in a lease which run with the land? All covenants implied by law run with the land and both the lessor and the lessee and their respective assignees are bound by them. A covenant to pay rent³ or taxes is essential to the existence of the lease and must run with the land. A covenant to maintain an embankment to use for protection against inundation is also an important one and is real.⁴ Conditions as to paying rent to the superior landlord of the lessor, to renew a lease and to pay damages for not giving information to the police of the commission of an offence or for not supplying provisions to an army passing through the estate are other instances of covenants that run with the land. An express condition for re-entry on the breach of a covenant is also an instance of a *real* covenant. The rights and liabilities of the lessor and the

See *Spencer's case*, 1 Smith L. C. Woodfall's Land. and Ten. (14th edition) p. 273.

Exp. N. P. 292, Woodfall's Land. and Ten., (14th edition) pp. 167, 168.

¹ *Parker v. Webb* 3 Salk. 5.

² *Morland v. Cook*, L.R., 6 Eq. pp. 212, 267 n., 37 L.J., Ch. 615.

any covenant, but he can have execution against one only. A deed of assignment is necessary to be registered under the law for the registration of deeds.

on
Covenants
running with
the land.

The assignee, however, is bound only by the covenants which *run with the land* and not the personal covenants of the original lessee.¹ Covenants that run with the land are *real* i.e., annexed to an estate. Such covenants bind all persons who come into possession of the real property either by operation of law or by act of parties.² In countries where conveyancing is a science and an art, the word "assigns" is almost invariably mentioned in leases whether a covenant is implied by law to be real or expressly made so by contract. But in this country instruments in the vernacular languages do not, as a rule, contain the word "assigns", and questions therefore may arise here as to what are the covenants in a lease which run with the land? All covenants implied by law run with the land and both the lessor and the lessee and their respective assignees are bound by them. A covenant to pay rent³ or taxes is essential to the existence of the lease and must run with the land. A covenant to maintain an embankment in use for protection against inundation is also an important one and is real.⁴ Conditions as to paying rent to the superior landlord of the lessor, to renew a lease, and to pay damages for not giving information to the police of the commission of an offence or for not supplying provisions to an army passing through the estate are other instances of covenants that run with the land. An express condition for re-entry on the breach of a covenant is also an instance of a *real* covenant. The rights and liabilities of the lessor and the

See *Spencer's case* & *Smith L. C. Woodfall's Land and Ten.* (14th edition) p. 273.

¹ *Exp. N P 290 Woodfall's Land and Ten.* (14th edition) pp. 167, 168.

Parker v. Webb 3 Salk. 3.

Norland v. Cook, L.R., 6 Eq. pp. 212, 267 n., 37 L.J., Ch. 815.

The framers of the Act adopted the rule from the old Common Law cases apparently forgetting that in India the art of conveyancing has been and is of a very simple character that formal conveyances to trustees expressly to prevent merger¹ are almost unknown to the people and the lawyers practising in the mofussil and that *benami* conveyances, which are looked upon with disfavour by the judges are not sufficient to mitigate the rigidity of the rule thus laid down. Evidence of intention to keep both the rights alive would I apprehend, be now excluded. If a zemindar lets out a village included in his estate in *putni* and afterwards purchases the *putni* himself the interests of the lessor and the lessee in the whole of the village would vest undoubtedly in one person at the same time. It is difficult however to understand the exact intention of the Legislature in the use of the expression "in the same right" and these words may afford some means of escape from the rigidity of the rule. If it implies that the purchase by the zemindar of the *putni* and the consequent vesting may be in a right different from that of his zemindari right and not in the same right we may perhaps escape from the difficulty. But such a distinction is inappreciable and too fine for the judges and lawyers for whom the Anglo-Indian Codes have been professedly framed.

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Forfeiture.

Determination of a lease by forfeiture may take place—(a) in case the lessee breaks any express covenant which provides for re entry on breach thereof² or renders the lease void or (b) the lessee denies the landlord's title.³ The landlord's right to eject the tenant and re enter on a forfeiture under the first head cannot accrue unless there is a breach of a condition and the penalty for the breach is expressly

¹ *Belaney v. Belaney* L. R. 2 Ch. Ap. 133. See also *Gokal v. P.* 100 Mal. L. R. 10 Cal. 1035.

² Lit. 2. 325; *Doe v. Wilson v. Phillips* 2 Bing 12.

³ Act IV of 1882, Sec. 111 cl. (g).

re-entry¹ and avoidance of the lease, and the landlord does some act showing his intention to take advantage of the conduct of the lessee. The breach of an implied condition cannot cause forfeiture. Even non-payment of rent cannot in itself be a cause of incurring the penalty of forfeiture, unless there is an express covenant to that effect.²

Forfeiture by disclaimer or denial of the landlord's ^XDisclaimer.
 right cannot happen as to permanent tenure-holders and occupancy-rayats under the Bengal Tenancy Act³. But the law, as understood before and as enunciated in the Transfer of Property Act, and which is applicable to all classes of tenants except rayats with rights of occupancy, is broader than the English law on the subject. The rule of English law is, that where, by matter of record, a tenant disclaims his landlord's title, and sets up an adverse title either in himself or in some third party, he thereby forfeits his tenancy, but denial by parol does not cause the forfeiture of a lease for a term certain. In Bengal, however, denial by parol is admissible. In order to make a disclaimer sufficient, it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession upon a ground wholly inconsistent with that relationship, so that there is by necessary implication a repudiation of it. As to what is a disclaimer is a question of fact.

The right to eject a tenant on disclaimer which has ^mNotice of
 caused forfeiture arises on the tenant's action, and no
 ejectment.

¹ Transfer of Property Act, Sec. 111, cl. (g) *Tamaya v. Timapa*, 1 L. R. 7 Bom. 262, *Musyatulla v. Noorzahan*, 1 L. R. 9 Cal. 808, *Narayana v. Narayana*, 1 L. R. 6 Mad. 327.

² Act VIII of 1885, Secs. 10 and 25, *Debiruddi v. Abdur*, 1 L. R. 17 Cal. 196, *Kabil v. Chunder*, 1 L. R. 20 Cal. 590; *Dhora v. Ram*, *ibid* 101.

³ *Sutyabhama v. Krishna*, 1 L. R. 6 Cal. 55, *Prannath v. Madhu*, 1 L. R. 13 Cal. 98, *Baba v. Vishvanath*, 1 L. R. 8 Bom. 228.

notice to quit is, therefore, necessary to entitle the landlord to sue. It is enough if the landlord shows by any overt act, his intention to re enter. The law, as understood before Act IV of 1882 came into force, did not require the landlord to do any act showing his intention to determine the lease.

† What constitutes disclaimer

The mere assertion by the tenant that he holds under a right superior to that of a temporary lessee when the relationship of landlord and tenant is admitted does not amount to a disclaimer of the title of the landlord.¹ The principle of the decision in *Vivian v Afoat*² and *Baba v Vishvanath Joshi*³ has been held to be wholly inapplicable in Bengal, where there are numerous tenures held by persons at fixed rents. It has never been understood in this part of the country that the assertion of such a right is a denial of the landlord's title as such. Courts in this country are reluctant for obvious reasons, to give the landlord the right to cancel a lease for conduct on the part of a lessee which is easy of explanation or arises out of confusion of facts. The frequent disputes between rival landlords and uncertainty of title common in this country are fertile causes of confusion in ignorant and illiterate people and it will be inequitable to take advantage of their weakness and credulity.

† Disclaimer of the title of an assignee of the landlord.

The denial of the title of an assignee or other legal representative of the landlord may also under certain circumstances, cause forfeiture. The rule that a tenant may not dispute his landlord's title applies only to the title of the original landlord, who let him in and not to the assignee of such landlord or any other person claiming through him.⁴ The tenant may

Doms v Melon, 20 W R 416. *Kali v Golum* 1 L R 13 Cal 3. But see *Baba v Vishvanath*, 1 L R 8 Bom 223.

² L R, 16 Ch D, 732.

³ 1 L R 8 Bom 224.

Durga v Sree 18 W R 465.

dispute the title of the assignee and put him to the strict proof thereof. If, however, the lessee or tenant has paid rent to the assignee, he can defeat the title of the assignee only by showing that he paid rent in ignorance of the true state of things and that some third person is entitled to it. The burden is on the tenant to make out a case of fraud, misrepresentation or mistake.¹ The Land Registration Act, compelling the registration, of the names of the proprietors of estates, and the Bengal Tenancy Act, of assignments and succession to permanent tenures, will, it is hoped, materially diminish, in future, litigation with reference to such questions.

The period of limitation for a suit by the landlord to eject a tenant on the determination of a lease is, under the general law, twelve years.² The tenancy may be determined on the happening of any of the events contemplated by section 111 of the Transfer of Property Act, and that section includes the case of the determination by forfeiture,³ either on account of a breach of a covenant or disclaimer of the landlord's title. Under the Bengal Tenancy Act, however, the rights of permanent tenureholders⁴ and of raiyats holding at a rent, or rate of rent, fixed in perpetuity,⁵ or having occupancy-rights,⁶ cannot be terminated on account of disclaimer of landlord's right,⁷ and the period of limitation, for a suit for the ejectment of a tenure-holder or a raiyat on account of any breach of condition in respect of which there is a contract expressly providing that ejectment shall

Limitation of suits

¹ A&T I of 1872, Sec 116, *Banee v Thakoor*, B L R., F B, Sup Vol, 588, sc, 6 W R (A&T X) 71

² A&T XV of 1877, Sch II, Art 139, *Kedar v Khettur*, I L R 6 Cal 34; *Gunesh v Goudour*, I L R 9 Cal 147. But see *Ganga v Zahuriya*, I L R 8 All 446; *Musharaf v Iftkhar*, I L R 10 All 634, *Soman v Raghubir*, I L R 24 Cal 160

³ A&T IV of 1882, Sec 111, cl (g) ⁴ A&T VIII of 1885, Sec 10.

⁵ A&T VIII of 1885, Sec 18 ⁶ A&T VIII of 1885, Sec 25

⁷ *Debiruddi v Abdur*, I L R 17 Cal 196, *Dhora v Ram*, I L R. 20 Cal 101

be the penalty of such breach is noly ooe year¹ The rule of twelve years applies to all oon agricultural leases and leases of agricultural lands in districts to which the Bengal Tenaocy Act has not been extended The divergence as to the periods of limitatinn with refereoce to similar kinds of interests in land is rather wide and I hope there will be early interference by the legislature

om
Waiver of
forfeiture.

Courts are always reluctaot to allow a landlord to take advantage of a breach of coveoant entitling him to re-eoter Any act on the part of the landlrd, showing an intention to treat the lease as subsistig, has been held to operate as a waiver of the forfeiture² But the mere lyiog by and witoessig the breach is no waiver there must be some positive act³ Neither will an act dooe, acknowledging the cootinuance of the tenaocy operate as waiver if the act be dooe by the laodlord without knowledge of the teoaot haviog committed a breach which would cause forfeiture⁴ Notice or knowlege of the forfeiture at the time of the supposed waiver affords evidence of ioteotion in the laodlord to accept the lessee as a teoaot notwithstanding the breach

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Acceptance
of rent as
waiver of
forfeiture

Acceptaoce of rent accruiog due after the forfeiture operates as waiver of fnrfeiture⁵ But if it is accepted after the institutinn of a suit for ejectmeot on the ground of forfeiture there is nn waiver Fnrfeture may also be waived by distress for rent,⁶ as distress can be levied noly oo a tenant Fnrfeture may also be waived by pleadiog⁷ But the waiver of one breach does not bar the cancelment of the lease for a subsequent

Act VIII of 1835, Sch. III Art. 1

¹ Act IV of 1852, Sec. 112. Sheppard v. Allen, 3 Taunt. 72.

Act IV of 1832, Sec. 112.

Act IV of 1832, Sec. 112; Hall v. Poole 1 L. R. 9 Cal. 845; Jogeshur v. Mahomed, L. L. R. 24 C. L. 33.

Grimwood v. Moss, L. R. 7 C. L. 360; Ward v. Day 31 L. J. Q. B. 11; Cotterworth v. Spinks, 30 L. J., C. P. 220.

Evans v. Davis, L. R. 10 Ch. D. 747.

breach¹ Receipt of rent or distress can only be an acknowledgment of the tenancy up to the date of the receipt of rent or distress, and the waiver of any forfeiture up to a certain day cannot be pleaded in defence to an ejectment for a subsequent breach, even where the breach is of a continuing nature²

As regards non-permanent tenures, it is doubtful whether the remedial provision, such as is provided by section 155 of the Bengal Tenancy Act, apply to them. It would seem from the definition of the word 'tenant', as given in the Act, that the section does apply to non-permanent leases as well to permanent leases and raiyati interests. If so, the sections of the two Acts have to be read together, and the restrictions put upon the right of the landlord by section 155 of the Bengal Tenancy Act should be attended to. The Conveyancing and Law of Property Act, 1881, 44 and 45 Victoria, Cap 41, which came into operation from the 1st January 1882, restricts in England the landlord's right of forfeiture, and the main provisions in this respect, have been embodied in section 155 of the Bengal Tenancy Act, but attention was not paid to these provisions when the Transfer of Property Act was passed in the beginning of the year 1882, and the reason seems to be that the Act had been drafted before the Conveyancing and Law of Property Act, 1881, was passed.

om
Relief against
forfeiture

Special provision has been made for relief against forfeiture for non-payment of rent³. Before the Transfer of Property Act came into force, Courts in Bengal, following the analogy of section 78 of Act X of 1859 and section 52 of Act VIII (B C) of 1869, granted, in similar cases, equitable relief against forfeiture, by allowing the

om
Relief against
forfeiture for
non-payment
of rent

¹ Dulli v Meher, 8 W R 138¹, Chunder v Sirdar, 18 W R 218

² Doed Mustin v Gladwin, 6 Q B 953

³ Act IV of 1882, Sec. 114

Judgment debtor to pay in the amount of debt and costs within fifteen days of the date of the judgment.¹ The Bengal Tenancy Act has made a provision similar to that laid down in the old Rent Acts in the case of tenants other than permanent tenure holders, raiyats holding at fixed rates and occupancy raiyats² who cannot be ejected for non payment of rent.³ Under that Act the landlord is entitled to institute a suit for ejectment of a tenant, other than tenants specified above for non payment of rent when an arrear of rent remains due after the end of the Bengali year, where that year prevails, or at the end of the month of Jaist where the Fashi or Amli year prevails. This right may be exercised whenever arrears are due at the end of the year, whether a decree for rent has been passed or not. The right does not depend upon any covenant for ejectment on failure to pay rent, as it does not arise out of contract but is given to the landlord by the statute. When the right is given by a contract, the provisions of section 114 of the Transfer of Property Act apply. But do they apply to temporary leases of agricultural lands in the Mofussil? The same legislature has in the course of three years, passed two enactments, many of the provisions of which interlap each other while some of them are not quite consistent. The earlier enactment⁴ is broader in application both as to its local extent and the class of cases to which it applies the later one⁵ applies only to agricultural lands in Bengal and is merely the reproduction of the law enunciated in Act X of 1859 with slight modifications. You will observe that a tenant, the incidents of whose relationship with the landlord are

Mothoora v Ram 4 C. L. R. 469; Mahomed v Prysaz 1 L. R. 7 Cal. 366.

Act VIII of 1883, Sec. 66.

Act VIII of 1883, Sec. 63.

Act IV of 1882.

Act VIII of 1883.

governed by the Transfer of Property Act, must, before he can ask for relief against forfeiture for non-payment of rent, at the hearing of the suit, pay or tender, to the lessor, the rent in arrear with interest and full costs, or give such security within fifteen days as the court thinks sufficient for making such payment. There is no such restriction in the Bengal Tenancy Act.

We must take it, therefore, that in the Mofussil of these provinces, where either Act X of 1859, Act VIII (B C) of 1869 or Act VIII of 1885 applies, the remedial provisions contained in these enactments apply to temporary leases. The reported cases, bearing on the construction of section 78 of Act X of 1859 and section 52 of Act VIII (B C) of 1869, seem to indicate that the rule applies to all leases, temporary or perpetual, whenever there is a condition for ejectment for non-payment of rent.¹ The Bengal Tenancy Act has, as we have already seen, practically, made the condition for ejectment for non-payment of rent, in cases of permanent leases, void and incapable of being enforced by judicial process.² The condition is enforceable only in cases of non-permanent or temporary tenures.

Remedial
provisions in
the Rent
Acts

The remedial provision in section 66 of the Bengal Tenancy Act, which is applicable even when there is no covenant for ejectment on non-payment of rent, gives fifteen days' time from the date of the decree to pay in the arrears of rent, interest and costs, and if the Court be closed on the fifteenth day, the time is extended to the day on which the Court re-opens.³ The time may also be extended by the Court for special reasons. The liability to ejectment may thus be avoided, and thus the

Act VIII of
1885, Sec 66

¹ *Jan v Nittyenund*, 10 W R, F B, 12, *Duli v Meher*, 12 B L R 439, *sc*, 8 W R. 138, *Mothoora v Ram*, 4 C L R 469, *Mahomed v Peryag*, I. L R 7 Cal 566, *overruling Mumtaz v Grish*, 22 W R 376

² *Ante* p 181

³ Act VIII of 1885, Sec 66, cl (2) See *Hossein v Donzelle*, I. L R 5 Cal. 906

tenant may save himself from forfeiture, notwithstanding his agreement¹ The fifteen days time runs from the date of the final decree if there be an appeal² and the Appellate Court has also the power to extend the period Payment under protest may be sufficient³

on Holding over

Ijara or *thika* leases are generally at the creation, for a term exceeding one year The lessee or underlessee remains in possession after the end of the term and the lessor or his legal representative accepts rent from the lessee or underlessee or otherwise assents to the continuance of the lease⁴ The tenancy thus becomes one from year to year, and is terminable by notice to quit⁵ The notice may be waived on the part of the person giving it by any act showing an intention to treat the lease as subsisting⁶

on Notice to quit

A notice sufficient in law to determine the tenancy must however be given to one party by the other, and must be duly served The Bengal Tenancy Act contains provisions for service of notices to quit on non occupancy raiyats⁷ and under raiyats⁸ but it has made no provision for service of notice for determination of other kinds of tenancies terminable at the option of either of the parties We are not, however to understand from this omission that notice to quit is unnecessary in other cases The Transfer of Property Act says - In the absence of contract or local usage to the contrary a lease of immovable property granted for purposes other than agricultural or manufacturing, shall

Jan v Nityesund 10 W R P B 12 M dhub v Ram 16 W R
 151 Duli v Raj 1 L R 9 Cal 63.
 Noor v Koni 1 L R. 13 Cal 13.
 Sreesreedhur v Doorga 17 W R. 462
 Act IV of 1882 Sec 116
 Act IV of 1882 Sec. 111 (b) Ram v Musammat 7 W R 1511
 Chatur v Makuod 1 L R. 7 Cal 710.
 Act IV of 1882, Sec 113. Act VIII of 1883, Sec 45
 Act VIII of 1885 Sec 42

be deemed to be a lease from month to month, terminable, on the part of either the lessor or the lessee by fifteen days notice, expiring with the end of a month of the tenancy"¹ The notice must be given in writing by the party or his authorized agent, and served generally as summons in a suit in a civil court Proof of the posting of a letter containing the notice has been considered sufficient there being a general presumption in favour of the delivery of letters properly addressed and posted, and the endorsement on the cover, purporting to be by an officer of the post office to the effect that the addressee refused to accept the letter, has also been considered sufficient service If personal service cannot be had, the delivery or tender to a member of the family or servant or authorized agent at his residence, and not on the demised premises, has also been considered sufficient There may be substituted service by the notice being affixed on a conspicuous part of the property

The Act is, however, silent as to what would be considered proper notice, when by contract, express or implied, or by local usage, the tenancy is one from year to year It has been held in some cases, that the notice to quit is required to be reasonable only² The notice must, however, be to quit at the end of a year of the tenancy A notice to quit at the middle of the year or at the end of any one but the last month of a year appears to me to be bad³ The notice, however, need not mention the particular day on which the tenant is required to quit The words—"at the expiration of the current year's tenancy"—

om
Notice must
be proper

¹ Act IV of 1882, Sec 106

² *Prosunno v Sheikh*, 1 L R 3 Cal 696, *Ram v Netro*, 1 L R 4 Cal 339, *Jubraj v Mackenzie*, 5 C L R 231, *Jagut v Rup*, 1 L R 9 Cal 48, *Radha v Rakhal*, 1 L R 12 Cal 82, *Bidhu v Kefyut*, 1 L R 12 Cal 93, *Kali v Golam*, 1 L R 13 Cal 3

³ *Mahomed v Jadoo*, 20 W R 401

are sufficient. In some of the Calcutta cases it has been held that it is not necessary that the notice should be to quit at the end of a year of the tenancy if the notice is otherwise reasonable¹. But whatever the law might have been the Transfer of Property Act and the Bengal Tenancy Act have practically settled the question. A notice to quit at the end of ten days terminating on the 25th Jaist² or within thirty days³ from the date of service or the date of notice, is equally bad.

DM
Six months' notice.

The notice to quit at the end of a year of the tenancy must be served in reasonable time⁴. In all cases six months time is sufficient unless there is a special contract. But a notice to quit must be served before the beginning of the agricultural season or the season for making settlement with raiyats. If a year of the tenancy in Bengal ends in Choitra as it almost always does, the notice must be served at least in Falgun. What is a reasonable notice is a question of fact and should be determined from the evidence and circumstances of each case⁵. It was at one time contended, and contended with success in the Calcutta High Court that the service of a notice to quit was not absolutely necessary to entitle the landlord to maintain a suit for possession of the demised land, and that the suit itself might be considered as a notice⁶. But this view was not upheld by the Full Bench of the Court which held that previous service of a reasonable notice to quit was absolutely necessary to entitle the plaintiff to maintain a suit for possession against

¹ Jagat v. Rup, 1 L. R. 9 Cal. 48; Radha v. Rakhal, 1 L. R. 12 Cal. 82; Bidhu v. Kelyut 1 L. R. 12 Cal. 93; Kali v. Golam Ali 1 L. R. 13 Cal. 3.

² Ram v. Netro 1 L. R. 4 Cal. 332.

Jubraj v. Mackenzie 5 C. L. R. 231.

Bakra v. Binod, 1 B. L. R. (F. B.) 25; Janoo v. Dijo, 22 W. R. 542.

Jagat v. Rup, 1 L. R. 9 Cal. 48; Radha v. Rakhal, 1 L. R. 12 Cal. 82.

⁵ Hem v. Radha, 23 W. R. 440.

the tenant,¹ and the Transfer of Property Act has apparently adopted the principle of this decision. It seems to me that the safest course for the landlord is to adopt the English rule *i.e.*, six months' rule. If there is an annual rent reserved, the tenancy is one from year to year and is not terminable except at the end of a year of the tenancy. This rule of English law is consonant with justice and equity and consistent with the principle laid down in section 106 of the Transfer of Property Act.

A notice in the alternative form to quit or pay additional rent is very common in this country. In one case², Garth, C. J., was of opinion that such a notice was bad, but the opinion of the Calcutta High Court, as also the practice of the country, are against the view expressed by the learned Chief Justice³. No particular form of words is necessary in this country,—it is sufficient if the notice is explicit enough as to the meaning conveyed.

Form of
notice

The determination of a lease of immovable property also determines sub-leases and interests created by the lessee⁴. As I have already said, the interest created by a lessee cannot be more extensive than his own interest, and as soon as the lease terminates, the landlord is entitled to have possession of the leasehold property in the same condition as it was at the date of its letting. But there is an exception in the case of a surrender of a lease, either express or implied. The landlord ought not to be allowed, to the prejudice of an underlessee or a mortgagee, to take advantage of a relinquishment, which, by law, he

on
Determina-
tion of sub-
leases &c.

¹ *Rajendro v Bassider*, 1 L. R. 2 Cal 146, *overruling* *Hem v. Radha*, 23 W. R. 440; *Ram v Netro*, 1 L. R. 4 Cal 339. But see *Ram v Dina*, 1 L. R. 23 Cal 200.

² *Mohamaya v Nil*, 1 L. R. 11 Cal 533.

³ *Janoo v Brijo*, 22 W. R. 548, *Budun v Khettur*, 24 W. R. 441.

⁴ Act IV of 1882, Sec 115.

is not bound to accept, and which can be valid only with the consent of parties¹. The landlord ought not also to take the same advantage as regards limitation in suits to avoid encumbrances as he would be entitled to do on the determination of the tenancy upon the terms of the original contract or by operation of law². To allow the lessor to take advantage over third persons by an action depending on the will of himself and his lessee, after such third persons have acquired rights either through acts or omissions of the lessee may give a premium to fraud³.

Forfeiture for a breach of covenant unless it is brought about by fraud has the same effect as the determination of the lease by efflux of time. It annuls all underleases and charges created by the lessee.⁴

The expiry of a lease does not entitle the lessor to put an end to rights acquired by the lessee by purchase of subordinate rights in the lands leased to him whether the purchases are made on voluntary conveyances or on forced sales in execution of decrees, even if the sales are for arrears of rent. We have already seen⁵ that the doctrine of merger ought not to be applied in its entirety to the dealings of people in this country. If a lessee for a term of years purchases a transferable subordinate right or a right of occupancy on a sale in execution for arrears due to him there is no reason in the law as administered in this country or in equity, why he should lose the

¹ *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Judson v. Schorne Kilburn*, L. R. 9 Cal. 671; *Great Western Railway Co. v. Smith*, 2 Ch. D. 253; *Venkata v. Anasai*, 5 Mad. H. C. 120.

² *Brinjabun v. Bhooopal*, 17 W. R. 377.

³ Act IV of 1882, Sec. 115. *Heera v. Gunga*, 10 W. R. 324.

⁴ Act IV of 1882, Sec. 115. *Great Western Railway Co. v. Smith*, 2 Ch. D. 253.

⁵ *Ante* p. 239.

Effect of for-
feiture on
sub-leases.

Rights ac-
quired by
lessees.

benefit of the purchase and lose also the money which he is legitimately entitled to have, and which, perhaps, he has himself paid to his own lessor. The interest of an *ijaradar* or farmer of rent is only temporary, while that of a proprietor or a permanent tenure-holder is such that the merger of a right of occupancy, under the provisions of section 22 of the Bengal Tenancy Act, cannot, in the great majority of cases, prejudicially affect his right. The section itself contemplates the case of a proprietor or a permanent tenure-holder, and not that of an *ijaradar* or farmer of rents

But rights acquired by a lessee as such in the nature of increments to the demised premises pass to the lessor. If a lessee for a term of years gets the renewal of a temporary lease from Government, in his own name, the landlord will be entitled to claim the right so acquired from Government as one acquired on his behalf

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Right of occupancy

The determination of a lease cannot affect any right of occupancy acquired by the lessee before the creation of the lease. The reported cases go further, and it has been held, that in the course of acquisition, a lease only keeps the right in abeyance¹. A person ought not to be made to lose a right for ever, simply because he acquires a superior right of a temporary character, and the landlord ought not to be allowed to take, from the creation of a lease, the advantage of extinguishing rights, which he would not otherwise be entitled to do

¹ Mokoondy v L G Crowdy, 17 W R 274

LECTURE VIII

SERVICE TENURES

Assignment
of land for
service.

In ancient societies, payments even in grain in lieu of services rendered to the State or communities, were rare if not quite unknown. Assignment of definite pieces of land was the usual mode for requiring public officers—the village headman (mandal), the accountant (patwari), and other important functionaries in the villages. The village watchman the *chowkidar* has even now his land—land held in his family for countless generations. The appropriation of land for the discharge of duties to the State was in fact, the normal condition of things in almost all countries, in the earlier stages of civilization. Military service was peculiarly within this rule.

Conversion of
service into
rent

The progress of time brought on necessary changes. The tendency in all offices to become hereditary and the hereditary possession of land for the discharge of the same duties for generations became the source of considerable inconvenience and the system, of allotting land for services to the State became rarer and rarer. Where hereditary employments and consequent possession of land had become inseparably connected the conversion of service into rent was found to be advantageous both to the holders of the land and to the State. Service was commuted into rent by mutual consent, and what were originally service-tenures became revenue-paying or rent paying tenures. Some service tenures however, have existed as such up to this day and the creation of such tenures even in modern days in India at least is not very uncommon.

During the five hundred and fifty-four years of Jaigirs Mahomedan rule in India, all traces of land-holding for military purposes, by means of grants made by Hindu kings, must have been obliterated, except in the border countries, where Mahomedan influence was least felt, and where the necessity of protection from the ravages and attacks of wild and hilly tribes kept up the ghatwals and tekaitis in hereditary succession. Sæmetic instinct was opposed to hereditary possession of land for military services and hereditary succession in public offices. Mr Shore, afterwards Lord Teignmouth, after that careful and elaborate investigation which was so characteristic of that eminent Anglo-Indian statesman, said in his Minute dated the 2nd April 1788 —“In the Moghul Empire, there are no hereditary dignities. The rank of the nobles was conferred by special appointment for life only, and revocable at pleasure, and it was estimated by the number of horse they were supposed to command. This command was denominated *musnub*, and a *jaigir* was an appendage to it.”¹ These *jaigirs* or military fiefs, granted for the support of the dignity of the officers and the troops kept up by them, were few in Bengal proper, but they were numerous in Behar. At the time of the Decennial Settlement many of these *jaigirdars* put forth claims to hereditary title. But such claims were against the constitution of the empire. It was accordingly declared that *jaigirs* were not heritable and permanent properties, and that, upon the demise of their present possessors, they should revert to the State. This declaration was embodied later on in Regulation XXXVII of 1793.²

But there is a class of service-tenures, partly military in character, which existed during the days of the Moghul rule and which survived the revolution brought on by the battle of Plassey—I mean, the tenures granted for

Thannadari
lands

¹ Harrington's Analysis, Vol. III 361

² Ante p 69

police purposes. The origin of some of these tenures may be traced to the Hindu period. At the time of the grant of the Diwani by the Emperor Shah Alum, many of the zemindars were, within their respective zemindaries entrusted with the rights and charged with the duties which properly belonged to the Sovereign. They were bound to maintain peace and order and administer justice and for these purposes they had to retain police forces and to employ judges or quazis. The police was under the control of *Thannadars* appointed by the zemindars and lands were generally appropriated for the maintenance of these officers.

Village
chowkidars.

In addition to the police forces thus kept, there were in every village watchmen for the protection of the person and property of the villagers. These were known as *chowkidars*, *patas gorais* &c.¹ These village watchmen also were remunerated by appropriation of land, and it would seem that this practice had continued from time immemorial. In Bengal proper these lands are known as *chowkidari chakeran* lands, and have recently been the subject of legislation.²

Ghatwals.

There was a third and a superior class of police officers, who protected the districts lying near the hills which were exposed to the ravages of the lawless tribes who inhabited them and who asserted a wild independence from the jungles with which they abounded. To prevent the incursions of these turbulent savages it was necessary to guard and watch the *ghats* or the hill passes through which the marauders used to make their hostile descent on the peaceful inhabitants of the plains. The persons who were employed to protect the *ghats* were known as *Ghatwals* and the lands held by them were known as *Ghatwali lands*. The *Ghatwali* tenures

¹ *Muz Tillari Pargh, Pata, Passan Gorai.*

² Act VI (DC) of 1870, as amended by Acts I of 1871, 1872 and 1873. See also Reg. XX of 1817 Sec. 21.

play an important part in the history of litigation in Bengal. In some of the districts, specially in the Chota Nagpur Division, these ghatwals are known as *Tekaits*.¹

The *chakeran* or service lands, held for purposes other than military or police, are small in extent and not of much importance. These are lands held in the so-called village communities, by watchmen and others, or else lands held under private individuals and families for the performance of services, generally relating to religious worship. Commutation of service into rent has, of late, been very common in the latter class of lands, and, perhaps, in the course of a few years, we shall cease to hear of lands held for the performance of services to individuals or families or even deities. In Bengal proper, lands held by officers, except the watchmen in the villages, can now hardly be said to be *chakeran* lands, for village communities as corporations have admittedly ceased to exist. And with their decay and dismemberment, and the want of recognition of their legal existence by the State, the power of enforcing services, from the holders of service lands, passed away, and is no longer enforceable. The descendants of the original holders now possess these lands without payment of rent or performance of service, and, in most instances, the zemindar or the person who represents him in the collection of rents, is capable of enforcing only occasional service. The *chowkidar* alone, having to perform a duty, which is necessary for the preservation of life and property, and which is enforced by the Government itself, has survived the ravages of time.

Village
chakeran
lands

The few years that followed the Battle of Plassey, the years of the double government and the uninformed government of the civil officers of the East India Com-

Appropriation of thanndari lands by Government

¹ Raja Lelanund Sing Bahadoor v The Government of Bengal, 6 M. I. A. 101

pany, have been counted as the most miserable period in the history of the British rule in India. In this transition stage the state of these Provinces was most deplorable. Famine with its attendant evils murder and rapine, cast a gloom over the whole country. The Mahomedan nawab was weak, and his police administration was weaker than ever. The position of the zemindars was uncertain. They had no inducement to improve the condition of the people, and were busy with schemes for self preservation. The freebooters and dacoits became the scourge of the country, whom even the strong hand of Warren Hastings could not sufficiently repress. When Marquis Cornwallis determined to assess land revenue for a period of ten years in the first instance with a view to the same being made ultimately permanent, and to convert the zemindars into land owners. It was proposed to make the landholders responsible for the peace of these districts, as they had been under the Mahomedan government. Regulation LXVII of 1791 declared the zemindars responsible for the peace of the country and the *thannadars* and the *chowkidars* were allowed to remain under their control. But within the course of a year the Government found that the *thannadars* and other police officers appointed by the zemindars were very inefficient, and incompetent to repress thugs and dacoits and it had to appoint its own officers to assist in keeping peace and order. This was extremely inconvenient and in 1792 Regulations XLIX and L were promulgated, by which the police establishments maintained by landholders were suppressed and the Government took upon itself exclusively the duty of preserving peace and preventing crime by means of a police force of its own. As a necessary consequence, the Government declared its intention of resuming all police lands and discontinuing any allowances to zemindars for the expenses of the police establishment. Regulation XLIX

of 1792 made provision for the appointment by Government of police forces, in different stations throughout the Provinces, each under the charge of a Daroga or Superintendent, the Magistrate of the district having the direct control over them. The village chowkidars or watchmen were declared to be subject to the control of the darogas, and they had to apprehend and send offenders, as well as to bring informations to the darogas and not to the zemindars

Regulation L of 1792 made provisions for the levying of a police tax, and for obtaining information as to the nature of allowances made to the zemindars and of the lands held by them for maintaining *thannadars* and other police officers, and the Magistrates of districts were required to report on these matters. The Regulation and the circulars issued under it referred only to *thannadars* and superior police officers, and not to chowkidars or village watchmen ¹ Regulation L of 1792

The enquiries directed to be made by Regulation L of 1792 were not completed, when the Decennial Settlement was declared to be permanent. In the amended Code of the Regulations of 1793, provision had, therefore, to be made for the resumption and assessment of *thannadari* lands. Regulation I of 1793, Section 8, clause 4 enacted that the *jumma* declared permanent was exclusive of, and unconnected with, the lands or allowances for keeping up *thannas* or police establishments, and that the Governor-General in Council had the power to resume the whole or any part of such allowances or lands according as he thought proper. The clause further declared that the allowances or the produce of the lands, which might be resumed, would be applied exclusively to the defrayal of the expense of the police. The amount that was to be thus collected was not to be added to the permanent *jumma*, but was to be assessed and collected separately Regulation I of 1793, Sec 8, cl 4

¹ Raja v Government, 6 M I A 101

The amounts thus separately collected were known in Bengal as *police jumma* or simply *police* though they are collected in the same way as land revenue

Other Police
Regulations.

Regulation XXII of 1793 re enacted, with alterations and amendments the Police Regulations of 1792 where by the Government had discharged the landholders from the superintendence of the police establishment Regulation XXIII of 1793 re enacted the provisions of Regulation L of 1792 Provision was made in this Regulation for the assessment and collection of a police tax by the Collectors of land revenue, and section 36 of the Regulation provided— The Collectors are to report all allowances that may have been made to the proprietors of land for keeping up police establishments either by deductions from their jumma, or by permitting them to appropriate the produce of lands for that purpose or in any other mode which may not have been already resumed with their opinion how far the whole or any part of such allowances can with equity be resumed in consequence of the proprietors of land being exonerated from the charge of keeping the peace as declared in Regulation XXII of 1793 This Regulation was repealed by Regulation VI of 1797 as any further provisions with respect to *thannadari* lands were considered to be unnecessary The *thannadari* lands were by this time converted into revenue paying estates or were amalgamated with estates within which they by the additional revenue called Police tax having been imposed as additional burden upon them Though some of these lands were formed into estates, subsequent experience has shown that they have been so intermixed with the lands of parent estates that they are almost incapable of identification

Village
chowkidari
lands.

The next class of police lands were those appropriated for the maintenance and support of village chowkidars Previous to the passing of Regulations XLIV and L of 1792 the *remindars* having the duty of maintaining peace and order had to appoint

not only the *thannadars*, but also a large number of other officers under the names of *chowkidars*, *pikes*, *pasbans* and *goraets*, for the maintenance of order in particular villages, for the protection of themselves and their properties, and also for collecting rents and enforcing services personal to themselves

The village functionaries, including the *chowkidar*, became, to a certain extent, the servants of the *zemin-dars*, and, though the services of the other village functionaries ceased in course of time, those of the *chowkidars* could not be dispensed with. The two classes of *chowkidars*, those appointed by the *zemindar* himself and to whom he granted *chakeran* lands for service, and those who held lands for generations as village watchmen, became almost undistinguishable in character. They agreed in this, that they had lands known as *chakeran* lands, that they acted under the orders of the same class of masters, and that they were performing the same sort of duties, but they differed materially in origin. Regulation I of 1793 (section 8, cl 4), and the previous Regulations passed before that year did not distinctly refer to *chowkidars* or village watchmen. Section 41 of Regulation VIII of 1793 enacted—"The *chakeran* lands, or lands held by public officers and private servants in lieu of wages, are also not meant to be included in the exception contained in section 36. The whole of these lands, in each province, are to be annexed to the *malguzari* lands, and declared responsible for the public revenue assessed on the *zemindaries*, independent *talucs*, or other estates in which they are included, in common with all other *malguzari* lands therein." Section 36 of the Regulation excepted only *lakhiraj* lands, though *thannadari* lands were also excluded from settlement.

While the Government made over absolutely, to the landholders, its supposed proprietary right, in all lands lying within the ambit of an estate, excepting only

Regulation
XX of 1817,
Sec 21

thannadari and lakhiraj lands, and included chakeran lands in the assessment of land revenue, the question necessarily arose, and arose very shortly after the Settlement, as to whether the lands held by village chowkidars were so included within the estate, as to make them the servants of the zemindar, removable at his pleasure, or whether these chowkidars should be under the direct control of the Government and the superior police officers. The distinction between chakeran lands held by public officers and those held by private servants in lieu of wages was easily lost sight of. The Government having taken the responsibility of the police administration of the country was, to a certain extent entitled to have superintendence over village chowkidars and rules were passed from time to time for enforcing strict control over them. Regulation XX of 1817 which repealed all the previous Police Regulations enacted—“Darogas of police should preserve and keep at the police stations (thannas) a complete register of village watchmen, employed within the limits of the authority of the said darogas” and these watchmen were declared subject to their orders. The Regulation further enacted—Upon the death or removal of any of the watchmen, the land holders and other persons to whom the right of nomination to such vacancies shall belong shall send the names of the persons whom they may appoint to the daroga of the jurisdiction that they may be registered by him as above directed.”

*Joy Kissen
Mookherjee v
Collector of
Burdwan*

In 1855 the late Babu Joy Kissen Mookherjee a zemindar of Utterpara in the District of Hughly raised with reference to a piece of land in *putni taluq* Govindapur in the District of Burdwan an important question as to the relative rights of the State and the Zemindar with respect to chowkidari lands. It was contended on his

behalf, as he had recently purchased the taluq at a sale under Regulation VIII of 1819, that the land held by the chowkidar was for performance of services *personal* to the zemindar, and that the chowkidar was removable at his pleasure. The Collector of the District, on behalf of the Government, contended, on the other hand, that the land was *chakeran*, reserved for the performance of police or chowkidari duties, and that the zemindar had no power to interfere with the possession of the land, as long as the policemen carried out their various duties. The Collector further contended that chowkidars were not bound to attend to duties personal to the zemindar. Lord Kingsdown, in delivering the judgment of the Judicial Committee, said, "We can find nothing in these Regulations (referring to Regulation XX of 1817 and the previous Regulations) which takes from the zemindar the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the chowkidar such services, as he was bound by law or usage to render to the zemindar. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchman might become liable, in addition to his police duties, to the performance of other services personal to the zemindar, as the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognise the interests both of the zemindars and the public in lands of this description. They were not to be included in the *malguzari* lands for the purpose of increasing the *jumma*, because the zemindars had not the full benefit of them, but they were to be included in the *malguzari* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be trans-

ferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest. The lands in suit were not held as *thanna dari* lands, in the strict sense of the term but as *chowki dari* lands appropriated to the maintenance of an officer whose duty it was to act as village watchman. It was further held that the chowkidars in the district of Burdwan had always been accustomed to perform services personal to the zemindars as well as to the Police. Their Lordships of the Judicial Committee accordingly held, that the lands in question were at the time of the Decennial Settlement appropriated and still are liable to the maintenance of such an officer and that the taluqdar has no right to take possession of them for his own purposes and hold them discharged of the obligation to which they were subject. The decree passed by Her Majesty declared that the lands in question were to be considered as appropriated to the maintenance of a chowkidar or village watchman and that the right of appointing such an officer belonged to the taluqdar and that such officer was liable to the performance of such services to the taluqdar as by usage in the zemindari of Burdwan chowkidars have been accustomed to render to the zemindar.

Remarks.

The case of *Joy Kishen Hookerjee versus the Collector of East Burdwan* established the following propositions and set at rest the disputes arising out of a confusion between the ancient chowkidari chakeran lands and lands granted by the zemindars for the performance of private duties. In each case it is now a question of fact to be decided from the evidence of usage as to whether the chowkidar is bound to render to the zemindar services other than what are strictly *chowkidari*. If the person in occupation of chowkidari land is

a village has been accustomed to perform private duties, in addition to his chowkidari duties, he must continue to do so, as if, in the words of section 41 of Regulation VIII of 1793, "the chakeran lands" are lands held by a private servant performing both public and private duties. The Government, however, was always unwilling to allow the zemindars the right of enforcing private services from the chowkidars, and in many districts, it has been held that such private duties to the zemindars are not performable by village watchmen. But whether the service was strictly police or not, the power of appointment, in cases of vacancy from death, and of removal for negligence and misconduct or for inability to perform chowkidari duties of a chowkidar, was always with the landholder. The zemindar had no right to take possession of the chowkidari lands and hold them discharged from the obligation of maintaining chowkidars. As regards strictly police duties, the chowkidar was under the superintendence of the higher police officers and the Magistrates of the districts, and in cases of misconduct, such police officers might require the landholder to nominate other chowkidars.

Chowkidari lands were heritable, only in this sense, that if the son or other heir of the chowkidar was competent to perform the duties his predecessor had been used to do, he was always elected, but it is difficult to say whether the zemindar was bound to elect him. It would seem, however, from analogy to the case of ghatwals, that the succession was hereditary, if the heir was competent to perform the duties attached to the lands. The lands, however, were inalienable and impartible, and the acts of one chowkidar with reference to them would not bind his successor. They were not saleable in execution of decrees. Non-performance of service, or refusal to serve, worked forfeiture.

Incidents of
chowkidari
lands

Act VI of
1870 and the
amending
Acts.

The decision of the Privy Council in *Jaykishan Mookerjee v The Collector of East Burdwan* was followed, within six years by the passing of Bengal Act VI of 1870 and the amending Act I of 1871. The police administration in most districts in Bengal required strict control and vigilant supervision over village watchmen, and the interference of landholders was a frequent source of trouble and consequent maladministration. The Village Chowkidari Act of 1870,¹ after making provisions for the appointment of punchayets, enacted—'All chowkidari chakerao lands assigned for the benefit of any village in which a punchayet shall be appointed shall be transferred to the zemindar of the estate or tenure in which such lands may be situated'.² The assessment was to be fixed at one half of the annual value of the land and the Collector of the district was, after the approval of the assessment, to transfer such land to the zemindar, subject to the assessment as a permanent charge.³ The assessed amount is realizable under the provisions of the Sale laws⁴ and is subject to the same rules as respect the avoidance of encumbrances. The amount thus assessed becomes a part of the police fund of the locality the land itself ceasing to be *chowkidari land*. The appointment and dismissal of chowkidars rest under the Act with the punchayet, subject to the sanction of the Magistrate of the district.⁵ Section 57 of the Act declared—That the right to the performance of any services to any person by the occupier of chowkidari lands transferred to any zemindar shall wholly cease and determine. The Act has been further amended by Acts V of 1871, 1872 and 1892.

Act VI (B.C.) of 1870

11 J. Sec. 43

Ibid. Sec. 50

Act VI of 1872 Sec. 55. and Act VII (B.C.) of 1874

¹ Act VI (B.C.) of 1870, Sec. 35.

Questions as to whether any and what lands are *chowkidari chakeran* lands occasionally cause difficulties and disputes. The Village Chowkidari Act of 1870 made provisions for the appointment of a Commission in any district or part of a district for the determination of such lands, and every order of the Commissioners, made under the provisions of section 61 of the Act, was declared to be final and conclusive, respecting all matters which the Act authorized the Commission to determine.¹ The words, "final and conclusive," in section 61 of the Act, are used in their ordinary and literal sense, and where a Commission has been appointed under section 58 of the Act for the purpose therein mentioned, and the Commissioners have ascertained and determined that certain lands are *chowkidari chakeran* lands, their decision, in the absence of fraud or non-compliance by the Commissioners with the provisions of the Act, is conclusive evidence in any subsequent civil suit, that the lands are what they have found to be.²

Commission for determination of *chowkidari chakeran* lands.

The Village Chowkidari Act of 1870 has not been extended to all villages in the Bengal Provinces, and section 21 of Regulation XX of 1817 is still in force in the villages to which the Act has not been extended.³

Regulation XX of 1817, Section 21

The services, which the *ghatwals* were required to perform, have, under the strong hand of British administration, ceased to be of much importance. In many districts, they may be dispensed with, in others, the emoluments of the *ghatwals* are, at the present day, disproportionately high. The Government on the one hand, and the *zemindar* on the other, claimed to take advantage of the want of necessity of further retaining their services, while the *ghatwals* themselves claimed to have hereditary title to hold the *ghatwali* lands, whether their services were required or not. This triangular contest

Ghatwali Tenures

¹ Act VI B C of 1870, Secs 58, 60 and 61

² *Nobokrista v The Secretary*, I L R 11 Cal 632

³ Act I (B C) of 1871, Sec 1

was, a few years ago, a source of constant litigation. The Banah Raj, as owning the large estate known as Kharakpore to Bhagulpore was tempted or compelled to enter the law courts as a litigant rather too constantly, and you will find in the Law Reports a good many conflicting judgments of the highest court sometimes of different judges, and sometimes of the same judges in review. But the law as to the rights of the parties has, at last, been settled partly by the Privy Council, and in some instances, by the good sense of the contending parties, by amicable settlement. The study of this branch of the law is still however, one of great importance.

Burdwan

The *ghatwali* tenures, with which the legal profession in this country is most familiar, are those of Birbhoom Bissenpore and Bhagulpore. But almost all the hilly districts in the west of Beogal have *police-service* tenures which go by that name. In the district of Burdwan, there were *ghatwals*, whose nominal duty was to protect the hill passes and travellers. Some of these though they go by the name of *ghatwals*, hold their lands rent free some pay a quit rent to Government known as *panchaki* while others pay a similar quit rent to the *zemindars*. These latter tenures are sometimes called *panchaki* tenures.

Chotanagpur

In Chotanagpur, the *ghatwali* tenures are much of the same nature as *ghatwali* jagirs in the districts of Birbhoom and Bhagulpore where the Government is interested in the performance of police duties by the *ghatwals*.

Hazaribag

In Hazaribag there were thirty-eight *ghatwali* tenures³ and each of these tenures was held by a head *ghatwal* called *Tikret*. They were semi-independent but paid a small annual sum as rent. Of the thirty-eight twenty-six have since 1780 become *mukdars*.

11 11 Statistical Account of Bengal, Ch. vii. p. 1
³ *Ibid.* Hazaribag

tenure-holders Ten others also subsequently obtained mukurrari leases These *tikaets* have now no services to perform, but are merely holders of permanent tenures The remaining two tenures were confiscated

In the district of Lohardagga, the ghatwals hold under the zemindar of Chotanagpur, and the Government has nothing whatever to do with them Many of these ghatwals are holders of hereditary ghatwali lands It appears that the zemindar has the right of resuming these lands, if the ghatwals do not perform the services required of them Lohardagga

A holder of a ghatwali service tenure, in Manbhoom, subject to the payment of quit-rent to the zemindar, died, leaving his rent for the last three years unpaid The zemindar was held not entitled to sue his son and successor in the tenure for such arrears, as it was a service-tenure, which could not be made liable for the debts of the person, who had ceased to hold the same¹ The dismissal of a ghatwal carries with it the forfeiture of his tenure² The dismissal itself is an executive act of the Government, and the civil courts cannot direct that he should be reinstated. Manbhoom

In the district of Monghyr, the *ghatwalis* were originally revenue-free service-tenures granted to petty hill chieftains, and the holders thereof were required to prevent the inroads of hillmen of Ramghurh and Western Santalia These tenures are now found chiefly in Perganah Chakai The tenure-holders now pay revenue after resumption, though they still go by the name of *ghatwals* and *tikaets* In *Tekaet Doorgapershad Sing v Tekaetnee Doorga Kooeree*,³ which was a case of one of these *tikaets* of Perganah Chakai, the dispute was as to *kulachar*, and the main question was Monghyr

¹ *Rajah v Bukro*, 10 W R 255, (*Raja v Madhab*, 1 B L R, A C, 195)

² *The Secretary v Poran*, 1 L R 5 Cal 740

³ 20 W R 154

whether females could succeed the tenure having originally been ghatwali. Pontifex J. in delivering the judgment of the High Court at Calcutta said—"It would be difficult to hold that a ghatwali estate must necessarily be held by a male to the exclusion of females." But the property in dispute in that case had long ceased to be a true ghatwali tenure. It was an ordinary revenue paying estate and the descent was regulated by the ordinary law of inheritance, and the plaintiff's suit against the female heir of the last male owner was accordingly dismissed.¹

Bankura

The ghatwali tenures of Bankura were originally jagirs granted by the Raj of Bissenpore which was at one time an independent Hindu principality. It is said that the Raj came into existence more than eleven hundred years ago. The conditions on which the ghatwali lands were held under the Raj were that the mountain passes should be protected and the roads kept open for travellers. Some of these ghatwals paid no rent, and others paid a small quit rent called *panchaki*. Originally there were forty three rent paying service tenures the rent being payable to the Raja of Bissenpore. In 1802, these ghatwali tenures were separated from the zemindari and the ghatwals were placed immediately under the English officer in charge of the district. The ghatwals were placed under direct Government supervision and the mehals were entered in the District register of estates. These ghatwali tenures are neither transferable nor heritable² as similar tenures in Bhagulpore and Birbhoom are. But the male heirs of the ghatwals are appointed to succeed to their posts unless there are very strong objections to the contrary. 'The

¹ 13 W. R. 10. See also 20 W. R. 154. *Doorga v. Doorga*, 1 L. R. 4 Cal. 192, 4 L. R. 5 L. A. 132.

² Hunter's Statistical Account of Bengal.

heir usually gets a new sannad of office, and if he is a minor, a servant or his guardian officiates for him, until he comes of age. Although the ghatwali lands are not alienable by right, the ghatwals contrive to encumber them by deeds of all descriptions, short of out-and-out sales. They mortgage them and grant mukurrari and mourusi leases, but inasmuch as a ghatwali tenure endures, only so long as the ghatwal personally discharges his functions, such encumbrances are easily avoidable, and are the source of much oppression and fraud."¹ In Harrington's Analysis, published shortly after the promulgation of the Regulation about the Birbhoom ghatwals, the Bissenpur ghatwali tenures are described to be small, specific portions of land, in different villages, assigned for the maintenance of the ghatwals and their subordinate officers, such as *pikes* and *chowkidars*. The distinction between these *ghatwali* tenures and the common chowkidari *chakerans* is thus expressed—"first that these tenures being expressly granted for purposes of police, at a low assessment, which has been allowed for, in adjusting the revenue payable by landholders to Government at the formation of the Permanent Settlement, the land is not liable to resumption, nor the assessment liable to be raised beyond the established rate, at the discretion of the landholders and secondly that although the grant is not expressly hereditary, and the *ghatwal* is removable from his office, and the lands attached to it liable to be taken away for misconduct, it is the general usage on the death of a *ghatwal*, who has faithfully executed the trust committed to him, to appoint his son, if competent, or some other fit person in his family to succeed to the office."²

¹ Hunter's Statistical Account of Bengal, Bankura

² Harrington's Analysis, 111-511 Erskine v Dwarka, 8 W R. 232, Farquharson v Government, 8 B L R, P C, 504, sc, 14 M I A 259

Birbhoom.
Regulation
XXIX of
1814.

The *ghatwali* tenures of Surhut and Deogbur, called in Bengal Regulation XXIX of 1814 *ghatwalis in the zemindari of Birbhoom* have their main incidents defined by that Regulation. Perganah Surhut lies in the north western part of the Birbhoom District and Deogbur is now a part of the Soothal Perganahs. These *ghatwalis* consist of entire villages and some of them contain extensive tracts of land. The preamble to Regulation XXIX of 1814 passed for the settlement of these *ghatwali* mehals states—'Every ground exists to believe that according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation in perpetuity, subject nevertheless to the payment of a fixed rent to the zemindar of Birbhoom and to the performance of certain duties for the maintenance of the public peace and support of the police.' The rent payable by the *ghatwalis* to the zemindar of Birbhoom is made payable directly to a Government officer and the amount is credited to the revenue account of the *zemindari*.¹ The mehals are saleable for arrears of rent.² But the most important provision in the Regulation is that contained in section 2—The *ghatwalis* and their descendants in perpetuity shall be maintained in possession of the lands so long as they shall respectively pay the revenue assessed upon them and they shall not be liable to any enhancement of rent so long as they shall punctually discharge the same and fulfil the other obligations of their tenures. Though nominally included in the Birbhoom estate they have no connection with the zemindar the Government being the sole director. The *ghatwali* lands are not partible and not divisible into small portions amongst the heirs of the *ghatwalis* as the very end for which the grants were made would be defeated by the lands being frittered away into small portions. The tenure usually

¹ Reg. XXIX of 1814, Secs. 3 & 4. ² Reg. XXIX of 1814 Sec. 3. *Herald & Review* 6 Feb. Rep. 169, 171.

descends to the eldest son¹, and though the estates of these ghatwals are estates of inheritance according to the terms of the Regulation, no ghatwal has the power of alienation, nor are¹ the lands attachable in execution of a decree for personal debts. The holder of a ghatwali tenure is entitled to the whole income of the estate, and its rents are not liable, in the hands of the heir in possession, to attachment for the debts of his ancestor or of the deceased holder². A ghatwal has not ordinarily the power³ to grant a lease of the whole or any portion of his ghatwali tenure in perpetuity. He cannot create any encumbrance, so as to bind his successor⁴.

The power to grant leases by holders of ghatwali lands in the district of Birbhoom, for terms extending beyond the term of their own possession, is, however, exercisable under certain restrictions contained in Act V of 1859. The development of the mineral resources of the country, discovered only a few years before, the clearance of jungles, and the erection of dwelling houses and manufactories, required that leases for long periods should be granted, and that the Government should be able to give good title to the grantees. It was, accordingly, enacted that the ghatwals should have the power of granting leases for any period, provided however, the Commissioner of the Division approved of the grants and certified the approval by an endorsement on the leases, with his own signature⁵. If the ghatwali lands are under the superintendence of the Court of Wards, the Court of Wards or the Commissioner of the Division

Act V of
1812

¹ Bally v Ganei, 1 L R 9 Cal 388, Kustoora v Benoderam, 4 W R Misc 5

² Binode v Deputy, 6 W R 129. The same case in review 7 W R 178. Raja v Madhab, 1 B L R 195, Grant v, Bangsi, 6 B L R. 652

³ Runglal v Deputy, Marsh 117, Santak v Vakut, S D A 1853, p 9000, Deputy v Runglal, W R Sp Vol 135

⁴ Grant v Bangsi, 6 B L R 652

⁵ Act V of 1859, Sec 1

has the power to grant such leases. This Act has finally settled all questions about the right of alienation and creation of encumbrances and under tenures by the Birbhoom ghatwals. The grants made to persons who have of late erected buildings in and near Deoghur are valid, being under the provisions of Act V of 1859, and approved by the Commissioner of the Division. Leases, not for the special purposes mentioned in the Act, are now no more valid than they were before the passing of the Act.

Kharakpore.

The ghatwali tenures in Mehal Kharakpore in Bhagulpore, have a history of their own. The tenures in Birbhoom and Bankura came under the direct superintendence of the Government in the early part of the British rule and the Government compelled the tenure-holders to perform the police duties which they had been performing from ancient times. But the Government did not find it necessary to exact these services from the Kharakpore ghatwals for a good many years. Their duties had fallen into abeyance and the Government accordingly, determined in the year 1836 to subject the ghatwali lands to resumption proceedings under Regulations II of 1819 and III of 1828. This was the beginning of a series of cases. In *Raja Tilanund Sing Bahadur v. The Government of Bengal*¹ their Lordships of the Judicial Committee after reviewing the whole law with reference to thannadari lands and other police service lands say — They (the ghatwali tenures) were held by a tenure created long before the East India Company acquired any dominion over the country and though the nature and extent of the right of the ghatwals in the ghatwali villages may be doubtful and probably differ in different districts there clearly was some ancient law or usage by which these lands were appropriated to reward the services of the ghatwals services which although they

would include the performance of duties of police, were quite as much in their origin, of a military, as of a civil character, and would require the appointment of a very different class of persons from ordinary police officers. We find accordingly that the office of ghatwal in this zemindari was frequently held by persons of high rank. Lands of this description could not properly be considered as lands of which the zemindars had been, before the year 1792, permitted by the government to appropriate the produce to the maintenance of Thanah or police establishments." Their Lordships accordingly held, after reviewing the facts of the particular case, that the ghatwali lands of Kharakpore were a part of the zemindari of Kharakpore and were included within the settlement of that Zemindari. The claim of the Government to resume these lands was dismissed. The Government, however, was entitled to enforce police duties, though it had not done so for many years, and though the performance of these services was no longer necessary. After the decision of the Privy Council in 1855, the Government entered into an arrangement with Raja Lilanand Sing. The ghatwals were absolved from the performance of the services required of them, as in fact such services were unnecessary, and the Government accepted from the Raja the sum of Rs 10,000 in lieu of these services. The retirement of the Government from the field of litigation limited the contest to the grounds of dispute between the Raja and the ghatwals.

In the course of litigation between the zemindar and the ghatwali tenure-holders of Bhagulpore, it was, at one time, gravely doubted whether these ghatwals were ordinarily descendible in the regular line of succession. The late Sudder Court¹ was inclined to hold that they were not, though the Birbhoom ghatwals were so, and were declared so to be by the Legislature. It was

Conflict of
authorities

¹ S D A for 1859, p 1812

also thought that the zemindar had the right to resume the lands, whenever the services were not required. In 1857 the Sudder Court stated, 'When the service ceases or is no longer required to be performed, the title of the ghatwals ceases also, and the zemindar has the right to resume possession of them'. In 1866 a Division Bench of the High Court at Calcutta¹ expressed the same opinion, saying that notwithstanding possession for a long period and payment of quit rent, a ghatwal not holding under a *sanad* conveying a hereditary indefeasible right would not be entitled to retain possession after the performance of the duties imposed upon him was no longer required as he had been allowed to enjoy the profits of the land in lieu of wages only. The tenure it was said lapsed when the services were no longer required and could not be rendered. But in a previous case another Division Bench of that Court had taken a different view, the learned Judges being of opinion that the ghatwals of Kharakpore held a perpetual hereditary tenure of a fixed jumma payable in money and service and could not be evicted by the zemindar except for misconduct.²

The question came before a full Bench of the High Court at Calcutta in *Kooladeep Narain Singh v Mahadeo Singh and others*³ and the learned Chief Justice, Sir Barnes Peacock in an elaborate judgment, which was affirmed by the Privy Council⁴ discussed fully the law as regards service tenures of the character of the ancient ghatwalis which had as held by the Privy Council in the case to which I have already referred existed from before the Decennial Settlement. These tenures were held to be hereditary from long possession,

Kooladeep Narain v Mahadeo Singh

¹ *Raja v Surin*, 5 W. R. 32; *Raja v Surin* and *others*, 6 W. R. 85.

² *Munir v Raja*, 3 W. R. 24; *Surin v Raja*, 11 W. R. 125, 126; 6 W. R. 122, 123; 11 W. R. 125, 126.

³ 14 J. A. 47; 11 W. R. 121.

⁴ 14 J. A. 47; 11 W. R. 121.

from their descent from ancestor to heir without objection for several generations, and from the recognition on the part of the legislature of the hereditary nature of similar tenures in Birbhoom, notwithstanding that the *sanads* did not contain words of inheritance. The Full Bench case and the judgment of the Judicial Committee¹ above referred to, further decided that the zemindar was incompetent to resume the lands at his option and put an end to the ghatwalis. Neither had the zemindar the power to put an end to the tenures on the ground that the services were no longer required. The learned Chief Justice is reported to have said — “Some cases were cited to show that, even assuming these lands to be subject to a ghatwali tenure, the zemindar has a right, whenever he pleases, to dispense with the ghatwali services and to take back the lands. Now, I must say, that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held, whenever he pleases, and take back the estates. It is not because the services are released or dispensed with, or become unnecessary, that the estate can be resumed. If a grantor release the services or a portion of the services, upon which lands are holden, the tenant may hold the land free from the services, but the landlord cannot put an end to the tenure and resume the lands. Many services, upon which very valuable estates are held, are of little value now. The estates may be very valuable and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates are liable to be resumed. It might as well be contended that, if lands were granted at a small quit rent, the landlord might relinquish or dispense with the payment of the rent and take back the lands.” His lordship added,—“Clearly the zemin-

¹ 6 W R. 199, sc., 14 M I A 247.

dar had no right to dispense with those services which had been reserved by the former Government for the benefit of the public. Suppose the former Government had granted land for services of a religious nature to be performed. The British government would not require those services, but that would be no reason for determining the tenure of the person who held the land upon these services as long as he is willing to perform them. The tenure is not to be determined merely at the will or caprice of the landlord, when the land has become valuable probably by the exertions and the expenditure of capital by the tenant."

*Forbes v. Ma-
homed Taki*

These principles of universal application enunciated by the Full Bench of the Calcutta High Court were affirmed by the Privy Council in the case of *Forbes v. Meer Mahomed Taki* decided in 1870.¹ That was a case from the District of Purnea for the resumption not of ghatwali lands but of lands granted by a rent free sanad in 1775 to keep off wild elephants and to maintain a body of men for the purpose of protecting the raiyats and cultivating the lands. The necessity of supporting a body of men for keeping off wild elephants having long ceased to exist the zemindar instituted a suit to resume the lands. The Judicial Committee expressed their concurrence in the principles laid down by Sir Barnes Peacock in *Baboo Kooladip Narain Sing v. Mohadeo Sing*. The judgment in the latter case came up before the Privy Council in the following year (1871) and was affirmed with a remark by their Lordships that it was entirely consistent with the well recognised principles of justice and equity. The cases of the Kharakpore ghatwals in which Raja Lilanand Sing was the plaintiff and which were suits for resumption of ghatwali lands on the ground that the services were no longer required and that

the Government had not only dispensed with them, but had itself undertaken to perform them, receiving from the Raja an additional sum of Rs 10,000, were heard by the Judicial Committee of the Privy Council in the year 1873. Their Lordships said, that the sanads, under which the ghatwals held, did not merely give certain lands in lieu of wages to hired servants, but were grants of land upon the condition of certain services. The zemindar had not the power to dismiss them, merely because he did not require their services, but he had the power to dismiss them for incompetence or for not performing the services required of them¹. It is now settled law that neither the Government nor the zemindar has the right to disturb these ghatwals in their respective possessions.

Some expressions in the judgment of the Privy Council in *Rajah Lilanand Sing Bahadur and others v Thakar Monoranjan Sing and others*² led to another litigation for the enhancement of rent of certain ghatwali tenures. The Privy Council, in the case just mentioned, had expressed a doubt as to whether the zemindar was entitled to enhance the rent, supposing the tenures had been created subsequent to the Permanent Settlement. All the other Kharakpore, ghatwali cases had been compromised. In this case, the High Court at Calcutta held, that the grants had been made, prior to the Decennial Settlement, at fixed rent, and that as long as the ghatwals were able and willing to perform the services for which the grants had been made, the zemindar had no right to enforce payment of enhanced rent, on the ground that the services were no longer required. Neither by the general law, nor by any custom of the district, nor by any terms of the

Enhancement
of rent of
ghatwali
lands

¹ Kooldeep Narain Singh v The Government and others, 14 M I A 247, sc, 11 B L R. 71

² 13 B L R 135, sc, L R I A Sup Vol, 181

representatives, who were called *Kanungo Minhaidars*. The service tenures held by them have thus ceased to exist.

Village
priest &c.

The village priests or astrologers and other Brahmins who have or had to perform religious duties for village corporations hold *fakhiraj* lands, and they are now entitled to hold them irrespective of the services for which the lands are supposed to have been originally granted. These services are no longer enforceable by process of law. Such is also the case with barbers and other village functionaries.

Conclusion

The grant of land burdened with any service, is distinguishable from the grant of an office the performance of the duties annexed to which are remunerated by the use of land.¹ In the former case the grant is made to the grantee upon the condition of his performing certain services as a burden. In the latter case there is no grant of land properly so called, but the produce of the land is used as wages. A grant of the former kind may be so expressed as to make the continued performance of the service a condition to the continuance of the tenure so that the service ceasing, the tenure may determine. Again the grants of land partly as reward for past services and partly for the performance of future service *pro servitiis impensis et impendendis* are not uncommon. The instances we have given of ghatwall tenures fall under either the first or the third class and whether the services are performable for the benefit of private individuals, or for the public or for both the services cannot be dispensed with at the option of the grantor or his heirs. In most cases of grants for private services made

hookodeep M h dr 6 WR 122 per Jack n] ; F. M. v. M. 11
13 M I A 434 Lalande v. M. 11111] n L R 1 A 5 p 101 1881
Sa. 1111 v. A. 111111 12 B. M. H. C. Rep 324 K. 1 v. T. 11111
Settlement Officer f L R 1 B. M. 5501 11111 v. Collett f L R 1 B
11 on 207 f 11 11 v. 111111 f L R 1 B. M. 1111 111111 111111
f L R 1 B. M. 1111 1111

many years ago, written instruments are not available, and occupation of land and performance of services from generation to generation are often the only material facts from which we have to infer an original grant for particular purposes. The presumption, in such cases, is in favour of the continuity of possession in future, and the grants would naturally be supposed to come under the third head and should not be taken to be grants in lieu of wages for hiring servants. It is to the interest of the receiver of the services to bring the original grant within the second head. The receiver of the services may, in such a case, determine the tenure at any time by giving notice—the notice being reasonable.¹ The holding of land for service, though the service may be called rent in the broad sense of the word, creates no right of occupancy or any other statutory right recognised by the law.² The Bengal Tenancy Act expressly declares—“Nothing in this Act shall affect any incident of ghatwali or other service tenure, or in particular, shall confer a right to transfer or bequeath a service-tenure, which before the passing of this Act was not capable of being transferred or bequeathed.”³ If the services are no longer required or have necessarily ceased, the land is resumable at the option of the grantor, and the grantee has not the law in his side to resist the resumption. The grantee may also, after due notice, surrender the land declining to serve in future. The grantor cannot insist upon the performance of the services, non-performance of services only works forfeiture.⁵

¹ *Lakshmi v Chandī*, I L R 8 Mad 72, *Radha v Budhu*, I L R

22 Cal 938, and *v Ramrutno*, I L R 4 Cal 67

² *Hurrogob v Siva Narain*, W R, 1864, 324; *Chandra v.*

³ Act VIII of 1885, Sec. 181

⁴ *Moharaja v. Bhim*, W R, 1864, (A & X) 37

⁵ *Hurrogob v. Ramrutno*, I. L. R. 4 Cal 67

(1)

Use of land
as wages.

Laods granted in lieu of wages are incapable of being assigned or alienated, the grant being for personal services, and assignment being inconsistent with its nature. Vicarious performance may, however, be allowed¹. The beneficial interest of the grantees may, by custom or usage, be alienated or sold in execution of decrees². But the grantor having always the power to put an end to the services the purchaser or alienee is left to his mercy. When a small rent is reserved, a service-tenure may however be sold in execution for its own arrears³.

¹ *Sibb v Noorad*, 9 W R. 127

Rajah v Golames, 24 W R. 309.

² *Rajah v Kashee* 25 W R. 206

LECTURE IX.



RAIYATS.

The enquiries made and the discussions evoked on the proposal to make the Decennial Settlement permanent are highly interesting, and they afford materials for defining, with sufficient accuracy, the rights and liabilities of all classes of the Indian people at the time, either as owners or occupiers of land. The interest of the dumb millions who cultivated the land, and whose labour without capital was in truth the proverbial gold of India, was uppermost in the mind of the generous and truly noble Marquis, the Governor-General. His Lordship, while recommending concession of proprietary right to the *zemindars*, thus expressed his views in a Minute — “The privilege which the *raiya*ts in many parts of Bengal enjoy, of holding possession of the spots of land which they cultivate, so long as they pay the revenue assessed upon them, is not by any means incompatible with the proprietary rights of the *zemindars*. Whoever cultivates the land, the *zemindar* can receive no more than the established rent, which, in most places, is fully equal to what the cultivator can afford to pay. To permit him to dispossess one cultivator for the sole purpose of giving the land to another, would be vesting him with a power to commit a wanton act of oppression, from which he could derive no benefit”¹ His Lordship added — “With the fixity of the demand of the Government a spirit of improvement

Marquis
Cornwallis on
the rights of
the Indian
raiya

¹ Appendix to the Fifth Report, No 5

would be diffused throughout the country and the rayats would find further security ' and he hoped that "without any further and detailed rules of law regulating the rights and obligations of the parties the relations between the zemindars and the actual occupiers of land would be smooth and that things would adjust themselves as of necessity with the fixity of Government demand "

Views of Sir
John Shore.

Sir John Shore with greater experience of Indian thoughts and habits was of a different opinion and he expressed himself strongly against the Governor General's views. He observed — ' The rules by which the rents are demanded from the rayats are numerous arbitrary, and indefinite that the officers of Government, possessing local control are imperfectly acquainted with them whilst their superiors further removed from the detail have still less information that the rights of the taluqdars dependent on the zemindars as well as of the rayats are imperfectly understood and defined that in common cases we often want sufficient data and experience to enable us to decide with justice and policy upon claims to exemption from taxes and that a decision erroneously made may be followed by one or other of these consequences a diminution of the revenues of Government or a confirmation of oppressive exactions. The necessity of some interposition, between the zemindars and their tenants is absolute and Government interferes by establishing regulations for the conduct of the zemindars which they are to execute and by delegating authority to the Collectors to enforce their execution. If the assessment of the zemindari was unalterably fixed and the proprietors were left to make their own arrangements with the rayats without any restrictions injunctions or limitations which in deed is a result of the fundamental principle the present confusion would never be adjusted. This interference, though so much modified,

is in fact an invasion of proprietary right, and an assumption of the character of landlord, which belongs to the zemindar, for it is equally a contradiction in terms, to say that the property in the soil is vested in the zemindar, and that we have a right to regulate the terms by which he is to let his lands to the raiyats, as it is to connect that avowal with discretionary and arbitrary claims. If the land is the zemindar's, it will only be partially his property, whilst we prescribe the quantities which he is to collect, or the mode by which the adjustment of it is to take place between the parties concerned. The most cursory observation shows the situation of things in this country to be singularly confused. The relation of a zemindar to Government, and of a raiyat to a zemindar, is neither that of a proprietor, nor a vassal, but a compound of both. The former performs acts of authority, unconnected with proprietary right, the latter has rights, without real property, and property of the one, and rights of the other are in a great measure held at discretion. Such was the system which we found, and which we have been under the necessity of adopting. Much time will, I fear, lapse before we can establish a system, perfectly consistent in all its parts, and before we can reduce the compound relation of a zemindar to Government, and of a raiyat to a zemindar to the simple principles of landlord and tenant"¹

The opinion of the Governor-General, as you have already seen, prevailed with the Court of Directors of the East India Company. In the Proclamation announcing the Permanent Settlement and in section 8 of Regulation I of 1793 which reproduced the words of Art VII of the Proclamation, the Governor-General in Council declared "It being the duty of the ruling

Regulation
I of 1793

¹ Harrington's Analysis, Vol III, p. 397 Appendix to the Fifth Report, No 6,

power to protect all classes of people and more particularly those who, from their situation are helpless the Governor General in Council will whenever he may deem it proper enact such Regulations as he may think necessary for the protection and welfare of the dependant taluqdars raiyats and other cultivators of the soil'

Regulation
VIII of 1793.

Regulation VIII of 1793 imposed restrictions on the levying of any new *abwab* or *mathot* i.e. illegal cesses, from the raiyats and laid down that every exaction of this nature should be punished by a penalty equal to three times the amount imposed.¹ This Regulation also made provisions for the enforcement of *pottas* or leases obtained *bona fide* from landlord and directed that they should not be cancelled except upon general measurement of the *Perganah* for the purpose of equalising and correcting the assessment, or upon proof that the *pottas* had been obtained in collusion or that the rents paid within the last three years had been reduced below the rate of the *nirikhund* of the *perganah* (perganah rate)

English
theory of
rent

But beyond these vague and general rules there was nothing laid down to regulate the relation between the zemindar and the raiyat. The adoption of the theory of the existence in the Sovereign of proprietary right in land and its transfer to the zemindars and the strict measures adopted by the Government for the realization of its own dues acted most prejudicially on the actual cultivators. The English Governors of the country and the judges who administered the law being unable to find out any distinct rules for the protection of the interest of the poor tenantry attempted to introduce, in India the theory of rent which prevailed in England—the only theory with which they were familiar. In England customary rent had long been superseded by

competition rent To use the words of a learned author—“From the peculiar course of progress in England, and from that state of affairs under which the absolute ownership of the land was, from the close of the seventeenth century, in the hands, not of the cultivators, but of a limited class of proprietors, who were all powerful in the Legislature to regulate its measures with a view to their own interests above all others, there has been evolved a theory of Rent, which, although it may be scientifically correct with reference to the peculiar circumstances of England, is not equally correct when applied, and is, in many instances, not at all applicable, to other countries and other communities whose past history and present condition are in many respects, if not altogether, different The basis of this theory is the application of Capital to land It postulates the remuneration of the cultivator at no higher rate than the bare wages of unskilled labour The Capital employed must yield the ordinary rate of profit, not less than the average rate of profit derived from capital employed in other investments. The labourers who do the work of cultivation are paid the ordinary rate of wages, not more than the rate to which an overcrowded labour market renders it possible to reduce them, and this, too, often means but the very barest sustenance All the profit which the land yields after discharging these two items is Rent”¹ This theory of rent was practically accepted as law in India by the judges who administered it, until Act X of 1859 was passed The late Sudder Court, so late as the year 1849, held—“The connection between landlord and tenant in this country commences on a similar understanding, the under-tenant in Bengal, whether holding by a Pottah, or as a tenant-at-will, occupies land with the consent of the Zemindar, and the

¹ Field's Landholding and the Relation of Landlord and Tenant, pp. 41-42

rent however determinable is only a consequence of the arrangement.' ¹ Even after the passing of the Act of 1859 the question as to the principle of the assessment of rent was discussed by able advocates and Sir Barnes Peacock the then Chief Justice referring to the definition of Rent as given by Malthus in his Principles of Political Economy applied it in the well known case of *Ishur Ghosh v James Hills* ² to the state of things in this country. Later on the learned Chief Justice expressed the same opinion in the case of *Thakooranee Dossee v Bisheshur Mukherjee*,³ and referred to the case of *Queen v The Grand Junction Railway Co* ⁴ in support of his view of the law. The truth is that as long as the country did not recover from the shocks of the deadly visitation of 1770 and as long as land was plenty and raiyats had to be induced to cultivate the land no question arose but legislation was urgently needed before the middle of the present century.

The Regulations of the Bengal Code dealt with only two classes of raiyats the *khodkast* and the *paikast*. The infinite varieties of soil in Bengal and the different uses to which they are put the variations in value from local circumstances and the difference in periods of occupations creating difference in the status of tenants made the framing of comprehensive rules as to their rights and liabilities almost impracticable. The Hindu system was extremely simple and not only was it not well known and well understood at the time of the Permanent Settlement, but it would afford little help to a modern legislator dealing with an extremely complex state of things. The conversion of rent in kind into one in specie was in itself a cause of great complexity. The

↓ Distinction
between *khodkast*
and *paikast* raiyats

¹ *Deep Narayan v Sreenath*, S. D. A. (1912) 1543.

² W. R. Sp. Vol. p. 45 and on review p. 142.

³ I. L. R. (F. B.) p. 202.

⁴ Q. B. p. 13.

sage *Manu* had to deal with payments by delivery of shares of the actual produce, which varied according to specified circumstances. All that the landlord had in those early days to insist upon was cultivation, which would be beneficial to the king's treasury, to the community, by the clearance of forests, and to the cultivator himself, by affording means of easy livelihood. The sage said—"If land be injured, by the fault of the farmer himself, as if he fails to sow it in proper time, he shall be fined ten times the king's share of the crop that might otherwise have been raised, but only five times as much, if it was the fault of his servants without his knowledge."¹ Vyasa also lays down—"If a person after taking a field with the object of cultivating the same fails to do so either himself or through the agency of others, he should be made to pay to the owner a certain portion of the produce which the field would yield if it were cultivated and a fine to the king equal to that portion"² The fiscal system introduced by the Mahomedan rulers was never fully enforced in Bengal and, as we have already seen, Todar Mal's scheme was never completely carried out, and it was also impracticable to revert to the Hindu system. But further changes were needed with the progress of time and the altered state of things. The Permanent Settlement and the rigidity of the rules for the realisation of Government dues were prolific of consequences which were sufficient to disturb the equilibrium of existing state of things.

The *khodkast* raiyat,³ of the Regulation laws, was the cultivator who held lands as an agriculturist in the village in which he had his fixed residence. Authorities of great eminence have differed as to the origin of these raiyats, but the most approved interpretation seems to

* The *khodkast* raiyats

¹ Manu, Ch VIII 243

² Vyasa, quoted in the *Vivada-ratnakara*. The same directions have been given by other sages

³ The word *khodkast* comes from *khud*=own and *kast*=cultivation

be that he was a member of the community composing the group called the village cultivating the land of the village, having his homestead in it and yielding obedience to the rules and mandates of the body of elders in the village *mandals* or *pradhans*. It mattered little whether he was holding for a short period or from time immemorial. The rate of rent payable by him might vary according to the period of occupation. The status was acquired from residence and recognition by the community and not from length of possession, though length of possession might be an element leading to recognition. He was not necessarily a hereditary cultivator as he has generally been thought to be.¹

† The *Palkast*
railyats

The *palkast* or *palkast** raiyat on the other hand was a tenant who held land in one village residing in

From *Khalimnaw* and *Adahim*—cultivation, sometimes erroneously interpreted cultivating their own land and so leading to the mistaken notion that they had hereditary proprietary rights.—See Elphinstone's History of India, p. 248; Mr Shore's Minute of 18th June 1789 § 225; Mr Holt Mackenzie's Minute of 1st July 1819 §§ 328, 399, 431 &c.; and Carnegie's Land Tenures, p. 40, on this and other points connected with their status. They are also called *chappardand* *zajirs* from which and the antithesis of *Palkast*, the meaning is plain. At 252 and following pages of Selections from the Revenue Records of the North West Provinces published in 1866, will be found a number of opinions on this point. The best authorities are pretty well agreed that these tenants could not transfer their rights or sell their land—this privilege belonging to the *zamindar* class alone. The *khalk* of raiyat's interest or the right of occupancy into which modern legislation has turned it has of late years become not uncommonly saleable in the Lower Provinces. The Courts have held that it is not saleable as of right though it may become so by custom. The evidence offered in disputed cases very often consists of instances in which the landlord has brought the raiyat to let rent on sale in more than one degree for rent. This is a mode of obtaining through the intervention of the Courts a fine which goes in payment of the arrears of rent due from the late tenant. That the raiyat after it has purchased is an indication of a change he is entitled to make in the nature of his cultivation for and many cases.—*Field's Report on Land Revenue*, pp. 44 & 45.

* From *pal* owner and *kast* to cultivate.

another. He had no political status in the village in which he held the land and was considered to be a foreigner. He generally held lands which the people of the village could not conveniently hold. In the days of zemindars' influence, he might occupy lands as a rival of the permanent or *khodkast* cultivators. The Regulation laws did not attempt to afford protection to these tenants, though their number must have been very large in 1793. They thus became tenants liable to be ejected at the end of any agricultural year. The determination of tenancy by service of notice to quit was unknown, until very recently, and as a matter of fact, suits for ejectment were unnecessary, and these poor holders of land were at the mercy of the landlords.¹

The earlier sale-laws for arrears of Government revenue following the spirit of the second clause of section 60 of Regulation VIII of 1793 exempted all bonafide engagements of *khodkast* raiyats from liability to cancellation on sale for arrears,² and Regulation VIII of 1819, also laid down in distinct terms the non liability of *khodkast* raiyats or resident hereditary cultivators from ejectment or cancellation of bonafide engagements made with such tenants by the late incumbent or his representative.³ But *paikast* raiyats had no protection from eviction until Act X of 1859 made certain necessary provisions as to the status of the vast agricultural population of the Bengal Provinces.

✕ Protection from eviction.

Act X of 1859 practically abolished the distinction between the status of *khodkast* and *paikast* raiyats, a distinction based upon circumstances no longer applicable to the altered state of things brought on by peace,

Act X of 1859.

¹ From *Pai* (Corruption of *Pahi* from *Pah-Pas*) near, "living near," "non-resident," and *Kast* (Cultivation) Field's Regulations, pp 24-25

² Regulation XI of 1822, Act XII of 1841 and Act I of 1845

³ Reg VIII of 1819, Sec 11, cl 3

good government and improvements in commerce. The interest of the zemindars and the intermediate landholders would be best served, if the number of protected rayats was minimised and the number of unprotected rayats increased and every effort was made in this direction. But the Government was bound to afford protection to those, who, though not *khodkast*, had long been cultivating the same pieces of land, who got an attachment for them and who improved them by their labour if not by their capital as they had none. Legislation was urgently needed. This Act introduced a new classification of the agricultural population of the Bengal Provinces *i.e.* into three classes—(1) *rayats* holding at fixed rent from the time of the Permanent Settlement, (2) *rayats* holding lands for periods exceeding twelve years whether rent was paid at uniform rate or not and (3) *rayats* holding for periods of less than twelve years rayats holding under rayats of the first two classes and rayats holding the *private* lands of the landlord. The *khodkast* rayats fell within either the first or the second class indicated above but a few who might acquire such a status in recent years would not get the benefit of it until after the lapse of twelve years while the *patkast* rayats were most of them considerably raised in status.

Act VIII
(B.C.) of
1869.

Act V of 1859 was in force throughout the Bengal Provinces and with the modifications made by Act VI (B.C.) of 1862 and Act VIII (B.C.) of 1863 continued to be in force until Bengal Act VIII of 1869 was passed. This latter Act was merely as I have said a Procedure Act the substantive law laid down in Act V of 1859 having been reproduced almost *verbatim*. But the Non Regulation Provinces and Assam except Sylhet were not affected by it. The Bengal Tenancy Act (VIII of 1885) however made material alterations in the law, especially in favour of the rights of the *land*

class of raiyats who were overlooked by Act X of 1859 I now propose to deal with *raiya*ts at fixed rates

The word *raiya*t was not defined in Act X of 1859 and Bengal Act VIII of 1869. The High Court at Calcutta, however, had in several cases to define the status of a raiyat and distinguish it from those of a tenure-holder and of a middleman, as the incidents of an ordinary raiyat tenure under the law differed in several material respects from those of the other classes of tenants. In *Baboo Dhuuput Singh v Baboo Gooman Singh*,¹ Seton-Karr and Jackson, JJ, said "It is very difficult to lay down any general interpretation of the word *raiya*ts. As a general rule, they are the cultivating tenants, but they may not be cultivators at all themselves, they may cultivate their land by hired labour or by under-tenants. In this case, the amount of land included in the tenure is, we think, sufficient evidence that the tenants are not *raiya*ts." It was held that *raiya*t was not necessarily a cultivator but no middleman could be a *raiya*t.² He must hold land under cultivation either by himself or others who must take from him under his supervision as a superior cultivator.³ Mere subletting does not take away the character of a raiyat.⁴ He might not till the soil himself, but still he would be a bonafide *raiya*t if he derived the profits directly.⁵ The origin of the tenancy and the purposes for which the land was taken regulate to a considerable extent the status of the tenant.⁶ If the land was taken for the purpose of cultivation and clearance of jungles, notwithstanding that part of the land was cleared and cultivated by the tenant himself and the rest by *raiya*ts settled

X
Definition of
Raiyat

¹ W R, Sp Vol, Act X, 61

² See *Gopee v Sib*, 1 W R 68

³ *Ram v Lukhee*, 1 W R 71

⁴ *Kalee v Ram*, 9 W R. 344.

⁵ *Kalee v Ameerooddeen*, 9 W R 579

⁶ *Karoo v Luchmeput*, 7 W R 15, *Uma v Umatara*, 8 W. R 181

thereof or the terms of a lease if any, and, if that is silent, the circumstances attending its grant—these would generally show the original purposes, for which the land was acquired.¹ The raiyat would not lose his status or become a middleman merely by converting the land to a different use sometime after the acquisition.²

Act VIII of
1885.

In this state of the judicial decisions as to the status of a raiyat the framers of the Bengal Tenancy Act thought it proper to classify tenants under three broad heads namely *tenure holders raiyats* and *under raiyats*,³ and introduced sub divisions defining the status of each. The case law as to the status of a raiyat was crystallised in the definition given in section 5 sub section 2 of the Bengal Tenancy Act, which defines a raiyat to be 'primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants or with the aid of partners and includes also the successors in interest of persons who have acquired such a right. The explanation to the sub section adds that the right to bring land under cultivation is to be looked to notwithstanding the land is used for the purpose of gathering the produce of it or of grazing cattle on it. The explanation itself however is not exhaustive it only illustrates the principle laid down in the cases already cited. Sub-section 4 still further defines a *raiya* by laying down that in determining whether a tenant is a tenure holder or a raiyat the Court shall have regard to local custom and the purpose for which the right of tenancy was originally acquired. Ordinarily a *raiya* or cultivator in Bengal holds no more than a few acres of land and the Bengal Tenancy Act has therefore laid down

¹ *Khalistan v. Ahmed*, 11 W. R. 211.
² Act VIII of 1885 Sec. 4.

as a rebuttable presumption of law, that a tenant holding more than one hundred bighas of the standard measure of land shall be presumed to be a tenure-holder and not a raiyat.¹ We have now very little difficulty in determining the status of any tenant, a tenure holder or a raiyat. An indigo-planter or a tea-planter holding land for the purpose of causing the cultivation of indigo or tea, whatever the quantity of land may be, is a *raiya*t. A partner of an indigo concern is as much in the eye of law a person capable of enjoying the statutory rights in land as any other individual.²

The superior class of *raiya*ts are those who have held land from the date of the Permanent Settlement of 1793, at an unchanged rate of rent. The several Rent Acts have given them a status of permanency, fixity of rent, heritability and transferability, and as it is difficult to give direct evidence of the existence of the holding and uniform payment of rent since 1793, the Legislature has provided for a rebuttable presumption arising from proof of occupation and uniform payment of rent for twenty years next preceding the institution of the suit.³ With respect to succession and transfer either *inter vivos* or by will, the incidents of these holdings agree with those of permanent tenures, existing from the date of the Permanent Settlement.⁴ Sales for arrears of revenue or rent cannot affect them. Section 37 of Act XI of 1859 expressly provides that the purchaser of an entire estate, notwithstanding his power to avoid and annul all under-tenures and eject all under tenants, is not entitled to "eject any raiyat

Raiyats holding at unchanged rate of rent

¹ Act VIII of 1885, Sec 5, Sub-sec 5

² *Laidley v Gour*, I L R 11 Cal 501. But see *Cannan v Kylash*, 25 W R 117, *Raikomul v Laidley*, I L R 4 Cal 957

³ Act X of 1859, Sec 3, Act VIII (B C) of 1869, Sec 3, and Act VIII of 1885, Sec 18

⁴ Act X of 1859, Sec 4, Act VIII (B C) of 1869, Sec 4 and Act VIII of 1885, Sec 50

having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force Regulation VIII of 1819 (Section 11, cl 3) and the various Rent Acts also lay down that a purchaser at a sale under that Regulation shall not be entitled 'to eject any *khodkast* riyat or resident hereditary cultivator The Bengal Tenancy Act calls the interest of such riyats 'protected' ' and under no circumstances except on the breach of an express covenant can such riyats be ejected' But in one respect they have superiority to permanent tenures, namely persons holding lands under the holders of such lands cannot acquire rights of occupancy they are merely *under riyats* *

Ejection of
permanent
riyats.

Ejection of permanent *riyats* is almost unknown Their right is statutory and seldom if ever they hold under written leases The conditions of holding land are simple in their character and breach thereof can rarely occur Any express condition for ejection on breach of a covenant if there be a written lease must always be consistent with the provisions of the law relating to landlord and tenant ' If there be no written contract there can be little likelihood of the existence of any express condition for re entry on a breach of covenant at all events such covenants are very difficult to prove Further the covenants must be consistent with the provisions of the Bengal Tenancy Act if the contract of lease be one entered into after the passing of that Act Suits on the ground of breach of contract under the Bengal Tenancy Act must be brought within one year of the breach ' Under the old Acts such suits could be brought within twelve years of the breach.

Act VIII of 1819, Sec. 16a.

Id. Sec. 4.

* Id. Sec. III Art. 1.

Id. Sec. 15.

Id. Sec. 18.

Who are tenants at fixed rates of rent? The words "at fixed rates of rent" used in section 3 of the older acts and the words, "rent, or rate of rent, fixed in perpetuity" used in section 18 of Act VIII of 1885 mean substantially the same thing. In *Thakooranee Dossee v Bisheshur Mookerjee*¹, Peacock, C. J., said—"By the term, *fixed rates of rent*, I understand not merely fixed and definite sums payable as rent, but also rates regulated by certain fixed principles—such, for instance, as a certain proportion of the gross or of the net produce of every bigha, or such a sum of money as would be equal to such a proportion of the produce, or such a sum as would give to the raiyat any fixed rate of profit after payment of all expenses of cultivation. *Id certum est quod certum reddi potest* is a maxim of law." This wide interpretation of the words of the law, including, as it does, the cases of payment of rent by fixed shares of the gross produce, such as a half, or by *bhaoli* or *battar*, was followed in some cases². But in *Mahomed Yacoub Hossein v. Sheik Chowdhry Wahed Ali*,³ Trevor and E Jackson, JJ., held "that no rate of *bhaoli* rent varying yearly in amount with the varying amount of the gross produce of the land, though fixed as to the proportion which it is to bear to such produce, is a fixed unchangeable rent of the nature alluded to in section 4 of Act X of 1859". Bayley, J., dissented from Trevor and Jackson, JJ., and was of opinion "that a contract to pay *half* in kind did not involve a *varying rate*"⁴. Thus the weight of authority seems to be

Raiyats at fixed rate of rent.

¹ B L R, F B, 326, sc, 3 W R (Act X) 29

² *Mitrajit v Baboo Tundan*, 3 B L R App 88, sc, 12 W R, 14, *Ram v Baboo Latchmi*, 6 B L R App 25, sc, 14 W R 388, *Jutto v Mussamut Basmuttee*, 15 W R 479. *Hanuman v Kaulesar*, 1 L R 1 All 301

³ 4 W R, Act X, 23, sc, 1 Ind Jur 29

⁴ See also *Thakoor v Nowab*, 8 W R 170, *Hanuman v Ramjug*, H C R, N W P (1874) 371

away permanency, must be substantial. Change from Sicca Rupees into Company's Rupees (in accordance to the provisions of Act XIII of 1836) is not an alteration of rent—it is merely a difference in currency ¹ Slight and occasional differences in rent have been ascribed to inadvertence or mistake and not to intentional variation such as to prevent the operation of the statute ² The payment of *abwabs* or illegal cesses to the landlord are payments in addition to rent and cannot be construed into a variation of it ³ Abwabs are levied and paid with the express object of keeping the jumma intact. Abatement of rent on the ground of diluvion, the rate of rent remaining the same throughout, falls within the words of the Act and entitles the tenant to plead uniformity of the rate. ⁴

Change of rent.

In order to give the status of complete permanency, the raiyat must have paid at a fixed rate since the Permanent Settlement The Bengal Tenancy Act defines Permanent Settlement to mean "the Permanent Settlement of Bengal, Behar and Orissa made in the year 1793" ⁵ In the old Rent Acts, the words were not defined, but they evidently meant that well-known date ⁶

Permanent Settlement

The presumption of fixity of rent, arising from uniform payment for twenty years, is the same as that in the case of intermediate tenure-holders ⁷ The plead-

Presumption

¹ *Kalee v Shoshee*, 1 W R 248, *Kattyani v Soonduree*, 2 W R (A&T X) 60, *Tara v Shibeshur*, 6 W R (A&T X) 51, *Watson v. Nund*, 21 W R 420

² *Baboo Huro v Ameer*, 1 W R 230, *Ramrutno v Chunder*, 2 W R (A&T X) 74, *Anund v. James Hills*, 4 W R (A&T X) 33, *Munsoor v Bunoo*, 7 W R 282, *Elahee v Roopun*, 7 W R 284, *Watson v Nund*, 21 W R 420

³ *Sumeer v Huro*, 2 W R (A&T X) 93

⁴ *Radha v Kyamutoollah*, 21 W R 401

⁵ A&T VIII of 1885, Sec 3, cl 12

⁶ *Sheoburn v Ram*, 3 W R (A&T X) 20

⁷ *Ante* pp 174-5

ings must sufficiently raise the question and the proof of payment must be strict. But alterations arising from division¹ or consolidation² of holdings or on taking away a part of the land³ would not deprive the tenant of the right conferred on him by the Legislature.

How re-
butted.

The presumption may be rebutted by proof of substantial variation of rent at any time before twenty years, or by proof of the tenancy having originated subsequent to the Permanent Settlement.⁴ A break in the holding also rebuts the presumption but not if the tenant be illegally evicted.⁵ In *Lutteesfunnissa Bebee v Poolin Beharee Sein*⁶ the High Court remarked — Eviction, though it would put an end to the raiyat's possession would not destroy his holding if that holding would not have ceased to exist but for the eviction.⁷ Eviction by the landlord even if partial causes suspension of rent⁸ and even if the tenant did not pay rent during the period of dispossession he would be entitled to count the period and the landlord would not be entitled to plead non payment of rent as a bar to the presumption of the continuity of the tenancy.

When
Alteration of
rent on alter-
ation of area.

Notwithstanding, fixity the rent of a raiyat holding at a fixed rate of rent may be enhanced on the ground of increase in area of the holding there may also be abatement for decrease in area. Alteration of rent on altera-

Act VIII of 1885. See 50 S. 5-sec 3. *Jones Hill v Beshvarath* 1 W. R. 10. *Jones Hill v Huro* 3 W. R. (A. C. N.) 125.

S. K. N. C. v W. R. Sp. Vol. 1 (A. C. N.) 125. *Kari v S. S. 3* W. R. (A. C. N.) 53. *R. J. Huro* 10 W. R. 117. *See also Huro* 10 W. R. 429.

K. S. Ram 2 W. R. (A. C. N.) 17. *Sundha v Ram* 20 W. R. 412. See also Act VIII of 1845, Sec. 64.

Act X of 1852, Sec. 4.

Lutteesfunnissa Bebee v Poolin W. R. Sp. Vol. 91.

W. R. Sp. Vol. 91.

See also *M. B. B. v. Y. S.* 24 W. R. 314; *R. S. B. v. R. S. B.* 12 Cal. 82.

A. 10 p. 217.

tion of area is provided for in section 52 of the Bengal Tenancy Act,—additional rent for land found by measurement to be in excess of the area for which rent has been previously paid, and reduction of rent for deficiency in the area. Sections 17 and 18 of Act X of 1859 corresponding with sections 18 and 19 of the Bengal Act VIII of 1869 made provisions for enhancement or abatement of the rent of raiyats having right of occupancy. The Bengal Tenancy Act deals with all classes of raiyats. The rate of rent being once determined, the area can be found out easily by measurement.

The area of the holding of a permanent raiyat may increase by accretion, or by the tenant encroaching on the adjoining land of his landlord or the adjoining land belonging to a third person. It may decrease by diluvion or encroachment by a neighbouring holder. Cases of increase or decrease in area by alluvion or diluvion were formerly dealt with under the Bengal Regulation XI of 1825, Sec 4, cl 1, and in the absence of express rules,¹ the principles of equity and good conscience were applied. Section 52 of Act VIII of 1885, has now laid down detailed rules on the subject.

Accretion

Encroachment on the adjoining land belonging to the landlord does not make the tenant a trespasser with respect to such land, and the tenant cannot set up an adverse right with respect to it against the landlord.² In *Rashum v Bissonath*,³ Peacock, C J, held that no suit for enhancement could lie with respect to such lands, and the raiyat must be treated as a trespasser. In *Decourcy v Meghnath*,⁴ Mitter, J, held that the raiyat could not be sued for enhancement for the excess land thus brought under his possession. This view, however, is not in

Encroachment on landlord's land.

¹ *Zuheeroodeen v Campbell*, 4 W R 57

² *Ante* p 221

³ 6 W R (Act X) 57

⁴ 15 W R 157. See also *Frankissen v Monmohinee*, 17 W R 33

accordance with the English law, and the weight of Indian authorities is in favour of the proposition that the landlord is entitled to treat the encroachment either as a trespass and sue for *khas* possession or he may treat the raiyat as a tenant with respect to the encroachment, and demand additional rent.¹ In *Gooroo Doss Roy v Issur Chunder Bose* Markby, J, said.—"We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law, and it is a rule which is supported by reason and principle. In India, where there is a great deal of waste land and where quantities and boundaries are very often ill defined there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application namely that if an act is capable of being treated as either rightful or wrongful it shall be treated as rightful. Now in the case put the act of the tenant in taking possession of more land than was let to him though it may possibly have been a trespass and wrongful may in most cases equally well have been done with the assent express or implied of the landlord and so have been rightful and in the absence of any proof to the contrary, it is treated as the latter. We know of no case in which the principle has been expressly recognized by judicial decision

¹ *David v Ram* 6 W R. (A & X) 97; *Raj v Gooroo* 6 W R. (A & X) 106; *Sham v Doorga*, 7 W R. 122; *Golan v Baboo Gopal* 9 W R. 65; *Nuddyar v Masjan* I L. R. 10 Cal 820; A & VIII of 1885 Sec. 157. See also *Shaikh v Muzzamat*, 15 W R. 91; *Binode v Masseyk*, 15 W R. 493.

in India, but it is in accordance with the principle laid down by section 4 of Regulation XI of 1825 as to the increase of land by alluvion. In practice also encroachments made by the tenant are not considered as held by him absolutely for his own benefit against his landlord. If it were so, the tenant would in twelve years necessarily gain an absolute title under the statute of limitations, but we do not know of any case in which a title has been thus established¹

With respect to encroachments made upon the land of a third person by a tenant, he is considered to have made the encroachment, not for his own benefit, but that of his landlord, and a title acquired by the tenant by adverse possession against such third person inures to the benefit of the landlord. The tenant cannot treat the land as his own apart from the holding². It would seem that a suit for additional rent would lie for excess land thus brought into the raiyat's occupation³.

Encroach-
ment on
stranger's
land

Decrease in area due to diluvion has always been held to be a good ground for abatement of rent⁴. It would be inequitable and unjust to make the raiyat pay rent for the land which is lost by the action of a river. Abatement was also allowed for land taken for public purposes⁵.

Diluvion

Decrease of area on encroachment or dispossession by a title paramount always entitles the tenant to an abatement of rent *pro tanto*, but if a person without title dispossesses the tenant, it is the tenant's duty to

Disposses-
sion

¹ 22 W R 246

² Nuddyar v Meajan, 1 L R 10 Cal 820

³ *Ante* p 222

⁴ Afsurooddeen v Shorashi, Marsh 558, Kristo v Koomar Chunder, 15 W R 230

⁵ Mohesh v Gunga, 2 Hay 495, Gordon v Moharaja, *Ibid* 565, Prosuno v Soondur, 2 W R (A& X) 30, Maharajah v Chittro, 16 W R 201, Deen v Mussamut Thukroo, 6 W R (A& X) 24, Watson v Nistarini, 1 L R 10 Cal 544

protect himself. It would seem that no abatement could be allowed in such a case.¹

Registration
of transfers
&c

Registration of transfers and successions was not compulsory under the old laws and section 27 of Act X of 1859 and section 26 of Act VIII (B. C.) of 1869 did not apply to these raiyat holdings. The interest of these raiyats is not 'intermediate between the zemindar and the cultivator. So that no such raiyat holding would pass to an auction purchaser on sale for arrears of rent merely because the decree is against the registered tenant. Section 18 of the Bengal Tenancy Act lays down that such a raiyat shall be 'subject to the same provisions with respect to the transfer of, and succession to, to his holding as the holder of a permanent tenure. This seems to imply that the provisions of sections 12, 13, 14, 15 and 16 of the Act apply to these holdings.

Fixity by
contract.

A raiyat, though settled later than the Permanent Settlement, may acquire permanency and fixity of rent by contract with the landlord, subject to the provisions of the law. The incidents are regulated by the contract. The protection which the sale laws for arrears of revenue and rent afford to a raiyat who has acquired a statutory right is not available to the fullest extent to a raiyat who holds under a contract of fixity but he acquires as against the purchaser on such a sale the right of occupancy or the right of a non-occupancy raiyat as the case may be which the statutes afford to raiyats occupying and paying rent, and he cannot be ejected.

¹ Tripp v Kaledoon W R. Sp. Vol., (A & X) 123; Chand v Lokanath 6 C. L. R. 494.

LECTURE X

RAIYATS

(OCCUPANCY AND NON-OCCUPANCY).

Section 6 of Act X of 1859¹ laid down -- "Every *raiyat*, who shall have cultivated or held land for a period of twelve years, shall have a right of occupancy in the land so cultivated or held by him, * * * * * so long as he pays the rent payable on account of the same" There were certain exceptions to this rule, to which I shall presently draw your attention The expression 'right of occupancy' was used for the first time by the Legislature in 1859, and instead of the classification of *raiya*ts into the *khodkast* and the *paikast*, a new one was introduced, less complex in character and with incidents more favourable to the cultivating classes Possession and cultivation of land and payment of rent were all that were necessary to confer on the *raiyat* this right of occupancy Residence in the village in which he held land or his recognition as a member of the so-called political unit—the *village community*, would not improve or affect this statutory right in relation to the landholder, except perhaps in matters of enhancement or abatement of rent. A non-resident *raiyat* or an alien to the community of the village might thus have, in the eye of the law as laid down in 1859, almost the same privileges and immunities as the *khodkast* *raiya*ts He might still be a *paikast* *raiyat*, but if he could fulfil the conditions

¹ See also Act VIII (B C) of 1869, Sec 6

laid down in section 6 of the Act, he would cease to be a tenant holding land at the pleasure of the landlord, liable to be ejected at the end of any agricultural year, and he would not be bound to pay rent at the rate which the landlord might dictate. The same levelling hand of the Legislature that had brought down at the Permanent Settlement the ancient *rajas* and had elevated the farmers of revenue to the position of *semindars*, created, in the year 1859 a right for the mass of the agricultural population which raised them from the position to which they had been reduced on account of the want of any definite rules for the guidance of Courts of justice and the consequent introduction of rules of law with which English lawyers were familiar. On the other hand many raiyats who could be called *khodkast* were deprived of some of their privileges.

† Settled
raiya.

The Bengal Tenancy Act of 1885 has made no material alteration in the law as laid down in section 6 of Act X of 1859. It has, however, partially revived and brought under definite rules the rights of *khodkast* raiyats. The "settled raiyat," has enlarged means of acquiring occupancy right, while at the same time there has been a curtailment in cases of holdings in *churs* or *dearah lands* and lands held under the *utbandi* system.*

† Incidents of
occupancy
right.

The privileges attached to this right of occupancy¹ are considerably inferior to those of owners of property². It is heritable, according to the ordinary rules of inheritance to which the raiyat is subject—Hindu or Mahomedan or any other personal law, as the case may be. But in default of heirs the right is extinguished, and the landlord is then entitled to possession and to settle the land with other raiyats³. The crown is not the ultimate heir and cannot claim to have possession of the land as

Devolution
on death

¹ Act VIII of 1885, Sec. 20

Act VIII of 1885, Sec. 180.

² *Ishur v. Hills*, W. R. Spl. Vol. 148; *Bibee v. Maxwell*, 20 W. R. 139; *Lal v. Doo* I. L. R. 3 Cal. 781.

³ Act VIII of 1885 Sec. 26. See *Jatooram v. Mungloo* 8 W. R. 60.

the ultimate heir of the deceased holder of a right of occupancy. Ordinarily the right is not capable of being bequeathed by will, but local usage or custom may give the raiyat the power to do so.¹

This right acquired by a raiyat, in so far as it is merely statutory, is not transferable.² The raiyat cannot transfer it by mortgage, sale, gift, or exchange,³ nor is the right saleable in execution of a decree⁴ for money against him. The transferee acquires no title by the transfer,⁵ and if he succeeds in obtaining possession, he is liable to be evicted as a trespasser⁶ by the landlord, who is not bound to recognise him⁷ as his tenant. On assignment by the voluntary action of the raiyat, he is considered to have abandoned the land⁸ and forfeited his right, the landlord being entitled to immediate possession.⁹ But custom or local usage may make the right transferable,¹⁰ and when it is so, the transfer may take place by the voluntary action of the

663.S.26 B.
Transferability

¹ Act VIII of 1885, Sec 178, Sub Sec (3), cl (d).

² *Ajoodhya v Imam*, 7 W R 528, *Tara v Soorjo*, 15 W R 152, *Bibee v Maxwell*, 20 W R 139, *Nurendro v Ishan*, 13 B L R 274, *sc*, 22 W. R. 22, *Ram v Bhola*, 22 W R 200, *Srishtee v Mudan*, 1 L R 9 Cal 648, *Kripa v Durga*, 1 L R 15 Cal 89, *Kabil v Chunder*, 1 L R 20 Cal 590, *Kalli v Upendra*, 1 L R 24 Cal 212

³ *Dwarka v Hurrish*, 1 L R 4 Cal 925, *sc*, 4 C L R 130

⁴ *Kripa v Dyal*, 22 W R 169, *Bhram v Gopi*, 1 L R 24 Cal 355

⁵ *Doorga v Brindabun*, 2 B L R, App, 37, *sc*, 11 W R 163

⁶ *Bibee v Maxwell*, 20 W R 139, *Ram v Bhola*, 22 W R 200
See the cases cited above

⁷ *Joy Kishen v Raj Kishen*, 5 W R 147, *Suddye v Boistub*, 15 W R 261, *sc*, 12 B L R 84

⁸ *Hureehur v Jodoo*, 7 W R 114, *Nurendro v Ishan*, 13 B L R 274, *Kalli v Upendra*, 1 L R 24 Cal 212

⁹ *Ram v Bhola*, 22 W R 200

¹⁰ Act VIII of 1885, Sec 178 *Joy v Raj*, 1 W R 153, *Sreeram v Bissonath*, 3 W R. (Act X) 21, *Chunder v Kader*, 7 W R 247, *Nunkoo v Mohabeer*, 11 W R 405, *Unnopoorina v Oomachurn*, 18 W R 55, *Shunkur v Saifoollah*, 18 W R 507, *Jugut v Eshan*, 24 W R 220, *Dwarka v Hurrish*, 1 L R 4 Cal 925, *Palakdhari v Manners*, 1 L R. 23 Cal 179

rayat or may be effected by the various modes of involuntary alienation. The onus of proof of the usage or custom of transferability is on the rayat or his assignee, even if he is a defendant in a suit for ejectment.¹ But wherever the custom or usage of transferability is proved to exist the landlord is bound to recognise the transferee on his obtaining possession and wherever the Bengal Tenancy Act prevails as soon as notice of the transfer is given to the landlord.² The transfer must, of course be effected according to the means prescribed by the Transfer of Property Act³ but it should be remembered that registration in the landlord's office is not necessary in the same way as in the case of transferable intermediate tenures nor are the same penalties prescribed for non registration.⁴ The landlord's recognition of the sale must follow the alienation and consequent possession without the payment of any 'fee' or any other action on the part of the rayat or his assignee except an application for service of a notice under section 73 of the Bengal Tenancy Act.

⁰ Mode of using
land.

Act 2, 1880

The rayat may use the land in any manner which does not materially impair the value of the land, or render it unfit for the purposes of the tenancy.⁵ If the tenancy has been created for ordinary agricultural purposes e.g. for cultivating paddy or other crops the rayat will not be allowed to convert the land or any part of it into a tank or to erect substantial structures on

Kripa v Durga, 1 L.R. 15 Cal. 89 with cases cited therein. But see Doya v Anand 1 L.R. 14 Cal. 382; Palak v Mannera 1 L.R. 23 Cal. 179; Dalglish v Gurnuff 1 L.R. 23 Cal. 427.

Act VIII of 1885 Sec. 73. Ambika v Chowdhry 1 L.R. 24 Cal. 642. Act IV of 1882 Sec. 54.

Taramonee v Birsessar 1 W.R. 86; Karoo v Luchmeepat, 7 W.R. 15; Wooma v Hurea, 10 W.R. 101; Joy v Doorga 11 W.R. 348. For service of notice under section 73 of Act VIII of 1885, see Rules (Ch. V) 7 and 8.

Act VIII of 1885 Sec. 23; Sec. 178, Sub Sec. 3 (6)

it ¹ Neither will he be allowed to dig earth for making bricks ² It would seem from the decided cases that the conversion of paddy land into a garden for horticultural purposes is a misuse of the land In cases of such improper use of the land, the landlord is entitled to ask for an injunction for restraining the conversion and also for damages to the extent of the actual loss sustained by him, provided he has not acquiesced in such use of the land by the tenant, and the conditions necessary for the issuing of a perpetual injunction or for awarding damages are present ³ It is inequitable and unjust to compel the raiyat to fill up the tank or remove the structures or the fruit trees he might have planted It is also inequitable to award as damages an amount that may be necessary for filling up the tank or other excavation The measure of damages should be regulated by a calculation of the probable loss that may in future be sustained by the landlord Estimate the letting value of the raiyat's land before the conversion and that subsequent to it, and the actual loss of the landlord will be so many years' purchase of the annual loss ⁴ Under the Bengal Tenancy Act, however, the tenant may make the improvements specified in chapter IX

Under Act X of 1859, the raiyat had not the right to cut down trees, except those planted by himself ⁵ But he could prove custom or usage to the contrary Ordinarily, the custom of paying *chout* or a fourth part of the price of trees so cut down, even if planted by the raiyat himself, prevails in many districts. The Bengal Tenancy Act

obs. § 23A
Cutting down
trees

¹ Jugut v Eshan, 24 W R 220, Lal Sahoo v Deonarain, 2 C L R 294, *sc*, 1 L R 3 Cal 781, Prossunno v Jagunnath, 10 C L R 205

² Kadumbene v Nobeen, 2 W R 157, Anund v Bissonath, 17 W R 416 But see Peter v Tarinee, 23 W R 298

³ Whitham v Kershaw, (1886) 16 Q B Div 613

⁴ Nyamutoollah v Gobind, 6 W R (Act X) 40. Specific Relief Act, Sec 54

⁵ Abdool v Dataram, W R, 1864, p 367; Goluck v Nubo, 21 W R 344.

has, in this respect improved the status of occupancy rayats by laying down,—' He shall not be entitled to cut down trees in contravention of any local custom '1 The words of the law seem to imply that there is a presumption in favour of the rayat as to the existence of the right of cutting down trees whether the trees have been planted by him or not. Custom or local usage to the contrary may be invoked by the landlord to take away the right of the rayat.² Neither can the rayat, by any contract with the landlord, deprive himself of the right. Section 178 of the Act, sub sec 3, cl (b), makes such a contract obligatory, if it be not consonant with established usage or custom.

* Payment of rent at fair and equitable rates

The rent payable by an occupancy rayat is to be at a fair and equitable rate.³ The landlord is not entitled to claim more⁴ and the tenant is not entitled to tender less than what is payable at such a rate. Ordinarily the rayat is bound to pay at the customary or pergunah rate for the quantity of land actually held by him⁵ but in the absence of any evidence as to any other rate being fair and proper there is a presumption as to the fairness of the rate at which rent has been previously paid.⁶

* Ejectment.

Immunity from ejectment by the landlord, except under very peculiar circumstances is the greatest boon conferred on occupancy rayats by the Rent Acts of 1859 and 1869⁷ and the Bengal Tenancy Act of 1885. Ejectment was unknown in olden days but as demand for land increased ejectment or forcible nuster became

¹ Act VIII of 1885 Sec. 23.

Nasir v. Ram I L.R. 22 Cal. 742. Grijia v. Mita I L.R. 22 Cal. 744 (note). Sambar v. Lochin I L.R. 23 Cal. 854.

² Act X of 1859, Sec. 9; Act VIII of 1885, Sec. 24.

Noor Mahomed v. Hurri, W.R., 1864 (Act X) 75.

Thakooranoo v. Biswasbhar 3 W.R., Act X, 29, ac. B.L.R. (F.B.) 202. Act VIII of 1885, Sec. 27. Compare Acts X of 1859 (Sec. 5) and VIII (B.C.) of 1869.

Act X of 1859, Sec. 21. See also Sections 22 and 23 of Act VIII (B.C.) of 1869.

common. Act X of 1859 put an end to the landlord's right to eject occupancy-ryats, except for non-payment of rent¹ and breach of any condition in the contract or for misuse of the land. Ejectment could be enforced only under a decree of Court.² On non-payment of rent, the landlord had the right to get a decree for ejectment on default of payment of the amount of the decree within fifteen days from the date of the decree. If the tenure was transferable by custom or local usage, the landlord could not get a decree for ejectment³, he could only put up to sale the tenant's interest. Section 78 of Act X of 1859 and section 52 of Act VIII (B C) of 1869 afforded an equitable relief, even if the lease stipulated for immediate ejectment for non-payment of arrears. The Court might extend the period of fifteen days on reasonable grounds. The Bengal Tenancy Act has, however, taken away from the landlord this right to eject a riyat for non payment of rent. Whether the occupancy-right is transferable by custom or not, the tenant is not liable to ejectment for arrears of rent, but his holding is liable to be sold in execution of a decree for the rent thereof, and the rent is a first charge thereon.⁴ The landlord has now the right of selling the land as property belonging to the riyat, or if he does not choose to do so, he can follow in execution of his decree any other property of the riyat, moveable or immoveable,⁵ but he cannot eject him from his holding. The Act of 1859 recognised only a right to hold and cultivate, the Act of 1885 has recognised, in addition, a limited proprietary right in the riyat.

X
For non-pay-
ment of rent.

¹ Act VIII (B C) of 1869, Sec 52, Act X of 1859, Sec 78

² *Musyatulla v Noorzahan*, I L R 9 Cal 808, *sc*, 12 C L R 389

³ *Tirbhobun v Jhonolall*, 18 W R 206, *Kristendra v Aena Bawa*, 10 C L R 399, *sc*, I L R 8 Cal 675; *Fakin v Fouzdar*, I L R 10 Cal 547.

⁴ Act VIII of 1885, Sec. 65

⁵ *Lalit v Binodai*, I L R 14 Cal 14, *Fotick v Foley*, I L R 15 Cal 492

x For misuse of
land or breach
of condition.

Ejectment for misuse of land or for breach of any express covenant in the contract of lease for which liability to ejectment is expressly provided is an ordinary incident of a lease of immovable property even if the lease is permanent¹. But all civilized systems of jurisprudence have safeguarded the rights of lessees by rules necessary for the protection of the weak and the imprudent². The period of limitation for a suit for ejectment for breach of an express covenant is only one year from the date of the breach if the contract expressly provides³ that ejectment shall be the penalty for such a breach.

† On sale of
an estate for
arrears of
revenue.

The purchaser under a sale for arrears of revenue under the Sale Laws or under a sale for arrears of rent, when he acquires a title free of incumbrances can not evict a raiyat with a right of occupancy⁴ even though he may hold under a lease granted by the defaulting proprietor or tenure holder. The right of such a raiyat being statutory he is expressly protected notwithstanding that his occupation was originally based on a grant by the defaulter. Section 37 of Act XI of 1859 in its proviso states— "A purchaser shall not be entitled to eject any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force or to enhance the rent of any such raiyat, otherwise than in the manner prescribed by the laws in force therefor or otherwise than the former proprietor may have been entitled to do." Section 14 of Act VII (B C) of 1868 reproduces the law as laid down in section 37 of Act XI of 1859.

A& VIII of 1885 Sec. 25.

A& VIII of 1885 Secs. 155, 156, 44 & 45 VI& cap. 41 Sec. 14.

A& VIII of 1885, Schedule III Art. 1.

A& XI of 1859 Sec. 37; A& VIII of 1885 Secs. 159 and 160.

The Putnī-Sale Law¹ also protects from ejection " *khodkast* raiyats or resident hereditary cultivators " I need not remind you that in the year 1819 the expression "right of occupancy" was not used in the language of the Legislature, and the words used in the Putnī Regulation ought now to apply to occupancy-raiyats as well, especially as under the Bengal Tenancy Act, *settled* raiyats necessarily acquire occupancy-right in all lands held by them in the same village, and there is not much difference between *settled* and *khodkast* raiyats. The language used in the Regulation—"resident and hereditary cultivators"—requires, however, to be modified, as all occupancy-raiyats are not necessarily resident and hereditary. If the words are strictly construed, a good many occupancy-raiyats may suffer. Section 16 of Act VIII (B C) of 1865, re-enacted in section 66 of Act VIII (B C) of 1869, contains a similar proviso, though apparently by an oversight the Local Legislature, instead of adopting the language of the Revenue Sale Laws, retained the time-honoured expression used in Regulation VIII of 1819. Section 160 of the Bengal Tenancy Act includes, in the category of "protected interests" any right of occupancy, and any right conferred on an occupancy raiyat to hold at a rent which was fair and reasonable at the time the right was conferred. Section 159 of the Act lays down that a purchaser on a sale for an arrear of rent shall always take subject to "protected interests".

The right to sublet is an important incident of occupancy-holdings and requires special attention. In one sense, the right is inconsistent with the original purpose of cultivation which, as we have seen, lies at the inception of occupancy-right. The Legislature, however, has very wisely provided for the raiyat occasionally letting out his land or portions of it

X On sale under Regulation VIII of 1819 and the Rent Acts

X Subletting

¹ Regulation VIII of 1819, Sec 11, cl 3

to under raiyats. A raiyat with a right of occupancy may for various reasons be prevented from cultivating all his lands, and it would be extremely hard if the privilege of subletting be denied to him. The Bengal Tenancy Act devotes a small chapter¹ on under raiyats and section 178 sub section 3 cl (e) makes any contract between the landlord and his raiyat, which takes away his right to sub let subject to and in accordance with the provisions of the Act null and void. This right to sub let which is very frequently exercised by raiyats occasionally causes difficulties in distinguishing an occupancy raiyat from an under raiyat. The position of a raiyat with a right of occupancy becomes to all appearance that of a middle man or a tenure holder if he ceases to cultivate and is satisfied with receiving rent from the under raiyat. If, in addition his interest is transferable by custom and if, for a long time he has held land through under raiyats only, he becomes in fact a middleman though in the eye of law, he continues to be an occupancy raiyat,² the under raiyat not being allowed except under very peculiar circumstances to acquire the status of an occupancy raiyat. I have already drawn your attention to the observations of the Calcutta High Court in *Baboo Dhunput Singh v Gooman Singh*.³ Acquisition of land for the purpose of cultivation is all that is required to make a lessee a raiyat.⁴ It has been held that whatever may be the true definition of the word *raiya* it is by no means necessary that he should

Act VIII of 1885 Ch. VII. See also *J. mear v Goneye* 12 W R 110; *Khoshal v Joynooddeen* 12 W R, 451; *Dumree v Biswasur* 13 W R. 291.

Karoo v. Luchmeput, 7 W R. 15; *Hureehur v Jodoo*, 7 W R. 114; *Durga v Kall* 9 C L R. 449.

W R. 1864, (Act X.) 6; *Vide ante* p 285.

Act VIII of 1885 Sec. 5 Sub-Sec. 2, Explanation. *Ram v. Lukker*, 1 W R. 71; *Uma v Uma* 8 W R. 181; *Jalco v Ameer* 9 W R. 579.

be an actual cultivator. Section 6 of Act X of 1859 says distinctly that a *rayat*, who has *held* land for twelve years consecutively, is entitled to have a right of occupancy in the same way as a rayat who has cultivated land for the same period. But though an under-rayat is admitted to the occupation of land for the purpose of cultivation, his holding under a rayat and not a tenure-holder is generally a bar to his acquisition of the same right which his lessor has under the law. A rayat does not become a middleman, simply because, instead of cultivating the land, he erects shops on it, lets them out, and receives profits from the shop keepers.¹

The right to surrender the holding is another incident of occupancy-right.² We have already seen³ that permanent tenure-holders cannot relinquish their tenures without the permission of the superior holder. But the law has especially protected the right of an occupancy rayat, to surrender his holding, and any contract, taking away the right is invalid in law.⁴ If, however, a rayat is bound by a lease or other agreement for a fixed period, he is not entitled to relinquish his holding before the expiry of such period.⁵ There cannot be a surrender of a part of a holding nor can a sharer surrender his share.⁶ Abandonment by the tenant may in some cases amount to surrender.⁷

X
Surrender
and abandon-
ment

I propose now to deal with the following matters with respect to occupancy-right—(1) Who may acquire

X¹ *Khujoorunissa v Ahmed*, 11 W R 88

² Act VIII (B C) of 1869, Sec 20, Act VIII of 1885, Sec 86

X³ Ante p 203 *Heera v Neelmonee*, 20 W R 383

⁴ Act VIII of 1885, Sec 178, Sub-Sec 3, cl (c) *Gopal v Tarinee*, 9 W R 89

⁵ Act VIII of 1885, Sec 86, Sub-Sec 1 *Kashee v Onraet*, 5 W R (Act X) 81, *Tiluck v Mohabeer*, 15 W R 454

⁶ *Saroda v Hazee*, 5 W R (Act X) 78, *Mohima v Pitambur*, 9 W R 147

X⁷ Act VIII of 1885, Sec. 87 *Ram v Gora*, 24 W R 344, *Golam v Golap*, I, L R. 8 Cal 612

the right? (2) With respect to what class of land may the right be acquired? (3) How may the right be acquired? (4) What are the respective duties and liabilities of the landlord and the tenant during the period of the existence of the right in the tenancy? (5) How may the right be lost or determined?

† Rayats only
may acquire
occupancy
right.

Under section 6 of Act X of 1859 and Bengal Act VIII of 1869 as well as under sections 19 and 21 of the Bengal Tenancy Act a *rayat* only may acquire occupancy right. But all rayats are not entitled to have the privilege which the Regulation code of 1793 practically took away from the cultivators of the soil and which the Act of 1859 restored to them though partially, after the lapse of nearly sixty years. Broadly speaking—'Every rayat may have a right of occupancy in the land cultivated or held by him' but there are the exceptions which we have to note. As regards the actual cultivators, the Rent Acts of 1859 and 1869 made an exception as to persons holding or cultivating land under sub-leases from rayats having rights of occupancy if they held for fixed periods only or from year to year.¹ These sub-lessees are known by various local names in different parts of the country such as *korfadars durjotedars &c* and are called under rayats in the Bengal Tenancy Act. An under rayat could under the old law acquire a right of occupancy in lands sub let to him otherwise than for a term or from year to year² but ordinarily he could not acquire the right as he generally held for a term or from year to year. But cases might occur in which the terms of their sub-leases would entitle the under rayats to acquire the same sort of statutory right as the superior holders themselves. The Bengal Tenancy

Kotal v. Nadir 6 W. R. 168; *Abdool v. Kalce* 7 W. R. 81; *Kalce v. Ram* 9 W. R. 344; *Haran v. Mookta*, 10 W. R. 113; *Ramdhun v. Haradun* 12 W. R. 404; *Nil v. Dancesh*, 15 W. R. 469; *Unnopoora v. Radha*, 19 W. R. 95.

¹ Act X of 1859, Sec. 6.

Act, however, does not favour the acquisition of the right by under-riyats, as it manifestly tends to take away from the riyat with a right of occupancy his power of cultivating his lands himself or by hired labourers. The existence of the same sort of right in two persons, holding the same piece of land, one claiming under the other, is in itself an anomaly, and whatever conflict of opinions there might be under Act X of 1859, it may safely be said that under the Bengal Tenancy Act an under-riyat cannot acquire a right of occupancy, unless custom or usage favours him¹

A 'settled riyat' acquires, under the Bengal Tenancy Act, a right of occupancy in all lands held by him for the time being as a riyat². The idea of *the right* of a settled-riyat owes its origin to the right which was known to belong to *khodkast* riyats who were creatures of custom, but a *khodkast* riyat might acquire his peculiar status by residence in a village for a much shorter period than twelve years, though he is not necessarily, a "settled riyat" by holding land for a period of twelve years or longer. Recognition by the village political unit was all that was needed to make a new comer into the village a *khodkast* riyat, the period of residence being perfectly immaterial,³ but residence in the village was absolutely necessary to give the status

* Settled
riyats

The nearest cognate relation of a village *mandal*, unless he happened to be the heir-at-law, would not be a member of the political unit, if he happened to be a non-resident, even though he might hold land in it for a long period. He would still be a *parkast*⁴ riyat, having none of the burdens and the privileges of a *khodkast* cultivator. The "settled riyat" is a creature of the Legislature and not of custom or customary law. The Bengal Tenancy

¹ Act VIII of 1885, Sec 183, Illustration 2. For the incidents of an under-riyat's holding, see Act VIII of 1885, Ch VII.

² Act VIII of 1885, Sec 21, cl 1.

³ Ante p 280

⁴ Ante p 281.

Act, in section 20, makes every raiyat having a right of occupancy, i.e. holding land as raiyat continuously for more than twelve years in any village, a settled raiyat of that village. Whether the raiyat be *khodkast* or *paskast*, whether he be recognized by the residents of the village as a member of their body or not he becomes a *settled raiyat* as soon as he has acquired a right of occupancy in any land in the village. The acquisition of the right is dependent upon codified law and not upon the voice of the peasantry in a village. Again a person is a *settled raiyat* of a village, within the meaning of the Bengal Tenancy Act, if he has continuously held land in a village though the particular land may be different at different times¹. A person is deemed to have held as a raiyat land held by his predecessor and lands held by co-sharers as a raiyat holding are regarded as held by each separately². A person is also considered to be a *settled raiyat* of a village so long as he holds any land as a raiyat in that village and for one year thereafter³. If a raiyat recovers possession of his holding under section 87 of the Act he continues to be a *settled raiyat* of the village, notwithstanding the previous dispossession⁴. There is a considerable difference between the right of occupancy under the Rent Acts of 1839 and 1869 and the right of a *settled raiyat* under the Bengal Tenancy Act. A *settled raiyat* acquires a right of occupancy in any land he holds however short the period of occupation may be, not by occupation of and payment of rent for the same piece of land for a continuous period of twelve years.

Tenants holding land under the *bhagdari*⁵ or *bhaoli* system may acquire the right in the same

Act VIII of 1885, Sec. 20 cl. 2

Act VIII of 1885, Sec. 20, clauses 3 and 4.

Act VIII of 1885, Sec. 20 cl. 5.

Act VIII of 1885, Sec. 20, cl. 6.

Huroshur v. Bressur 6 W. R. (Act X) 17; Jitto v. Mussammat Basmullee, 15 W. R. 479.

way as raiyats paying rent in specie. The law makes no distinction between rent in kind and rent in specie. Thousands of raiyats, specially in the province of Behar, hold land under the system known as the *bhaoli*, *battai*, or *bhagdari*, and many of them have done so for generations.

It was at one time doubted whether an indigo concern or a firm, which has no corporate or legal existence as an individual or individuals, could acquire a right of occupancy.¹ It was contended, on the one hand, that the right could be acquired only by raiyats, and that members of an indigo concern could not come within the ordinary meaning given to that word, and that an association of persons constituting a firm, who had a large capital and who devoted their energy to the improvement of the soil for the benefit of the country as also for their own benefit, could not be said to be a raiyat. On the other hand, it was contended that there was nothing in the law to prevent the acquisition of the right by such an association. There was, in fact, no reason why a firm, cultivating indigo or tea by hired labourers, should not have the privileges of *raiya*ts in the sense the word has been used in the Tenancy Acts.² No doubt the word *raiya*t ordinarily carries with it the idea of poverty, ragged clothes, and miserable hovels, but I suppose the law never intended that the privileges of occupancy-right should be attached only to want and destitution, and not to wealth and palatial buildings. If a firm cultivating indigo or tea continues to have the same members and to occupy the same piece or pieces of land or hold land in the same village for more than twelve years, it should have the right which the law has created for the benefit of cultivators. The Bengal Tenancy Act, in section 5, read along

^x Indigo concerns

¹ Cannan v Kylash, 25 W R 117, Rai v Laidley, I. L. R. 4 Cal

² Laidley v Gour, I L. R. 11 Cal 501

with section 2 of the General Clauses Act (1 of 1868) clearly indicates that an association of persons or a firm is as much capable of acquiring the right as the poorest cultivator of the soil

† The landlord himself

The landlord himself cannot by cultivating his own land even if he were to use the name of a stranger as holding the land acquire a right of occupancy in the land so cultivated by him¹ The system of holding land in this country *benami* in the names of servants and relations, is common though no presumption ought to be made in every case in favour of *benami* holding Evidence may be given to show that the landlord himself has been cultivating and taking the profits of the land and such evidence may be sufficient to prove the *benami* character of the holding Cases about *benami* holding occasionally arise especially when the landlord's interest is sold and he, the outgoing landlord attempts to resist the purchaser by putting forward nominal holders under him

† Co-sharer landlords

A co-sharer out of a body of landlords cannot acquire the right by holding and cultivating land and paying a proportionate share of the rent to the other co-sharers Neither can he do so by holding land with the permission of the other joint owners the latter holding other lands by arrangement.² It is wrong in principle to allow a landlord to have the benefits of the right, which the law intended to confer only upon rayats and if a co-sharer landlord were entitled to acquire the right of a rayat, opportunities of committing fraud upon strangers and diminishing the actual quantity of *rayats* land in a village would be great At one time it was doubted by the High Court at Calcutta whether such a co-sharer could acquire the right and in one case³ it was

¹ *Reed v Sreekishan* 15 W R 430; *Radha v Rakhal*, L L R, 12 Cal. 82

Roghoobun v Bishan 2 W R. (A & X) 92.

Per Jackson, J in *Kale v Shah* 12 W R. 418

thrown out that the question was one of fact and not of law. It was held that the conduct of the co-sharers might be evidence for proving the existence of a right of occupancy in any one of them. But the Legislature has, in section 22 of the Bengal Tenancy Act, indicated that such an acquisition of the right cannot be recognized. The union of two inconsistent rights—of the landlord and an occupancy-holder, has been deemed improper and against the policy of law, and as soon as they unite in the same person, the inferior right is extinguished¹.

A lessee, such as an *ijaradar* or farmer of rent whether he is known as a *ticcadar*, *kathinadar* or *mostajir*, cannot acquire the right in any land comprised in his *ijara* or farm². A man cannot occupy the double character of a landlord and a raiyat and acquire a statutory right on the pretence of paying rent to himself³. If a person is already in occupation of land as a raiyat and obtains a lease of the landlord's right before the completion of the period of twelve years of his possession as a raiyat, his possession of the land during the period of the lease cannot be counted as that of a raiyat, and the acquisition of the

¹ But see *Sitanath v Pelaram*, 1 L R 21 Cal 869 and *Jawadul v Ram*, 1 L R 24 Cal 143. In this latter case, a division Bench of the High Court, consisting of five Judges, held—"The effect of a purchase, by one co-owner of land, of an occupancy right is not that the holding ceases to exist, but only the occupancy right, which is an incident of the holding, is extinguished." The result is that the purchasing co-sharer becomes a raiyat. What is his status? If he becomes a non-occupancy raiyat, he will be entitled to acquire the status of an occupancy-raiyat by twelve years' occupation. He cannot be an under-raiyat. The land being raiyati, the incidents of a landlord's private land cannot attach to it. Such a tenancy will certainly be of an anomalous character and one not recognized in the Act.

² Act VIII of 1885, Sec 22, Sub-Sec 3. *Lalla v Bhaka*, 17 W R 242; *Wooma v Koondun*, 19 W R 177, *Ramsaran v Veryag*, 25 W R 554, *Thomas v Panchanun*, 25 W R 503, *Lal v Solano*, 1 L R 10 Cal 45.

³ The unreported case *Kishen v Rajah Riddha* cited in *Lal v Solano*, 1 L R 10 Cal 45, *sc*, 12 C L R 559. But see *Jawadul v Ram*, 1 L R 24 Cal 143.

right remains in abeyance during this period.¹ If the right was already perfected before the beginning of the lease the right would not be lost. To use the words of Mitter J in *Lal Bahadur Singh v E Solano*,²—

During the time of the ijara the raiyat remains in possession of the land in a double capacity, and the operation of the acquisition of the right of tenancy remains in abeyance.

† Trespasser

A person possessing or cultivating land as a trespasser cannot acquire a right of occupancy.³ If he de facto had the position of a raiyat paying rent and held the land either stealthily or by setting the landlord at defiance his wrongful possession would give him no right as a raiyat. If he set up a *lakhiraj* title he would not be permitted to claim the benefit which only a raiyat paying rent is entitled to have.⁴ The setting up of a title hostile to the landlord amounts to a disclaimer which prevents the acquisition of the right.⁵

† Permissive possession

Permissive possession or possession by a servant as such is not that of a raiyat, and cannot confer the right.⁶

† Possession under a trespasser

I may here add that the acquisition of the right does not depend upon holding under and payment of rent to the rightful owner.⁷ The right is not acquired by the raiyat by virtue of any grant but it grows from the mere circumstance of his holding and cultivating land and paying the rent due in respect

¹ *Gurbaksh v Joolal*, 1 L. R. 16 Cal. 127.

² 1 L. R. 10 Cal. 45. But see *Gur v Joolal* 1 L. R. 16 Cal. 127 and *Masayk v Bhagubath*, 1 L. R. 18 Cal. 121.

³ *Peer v Meahjan* W. R., Sp. Vol., F. B. 146; *Gureeb v Bhoobun* 2 W. R. (A. & X) 85; *Sholikh Ghokam v Rajah Poorno* 3 W. R. (A. & X) 147; *Bhoobunjoy v Ram* 9 W. R. 449.

⁴ *Sreemutty Wooma v Kishor* 8 W. R. 238; *Ishan v Hurish* 18 W. R. 19; *Kaloo v Shashonee*, 23 W. R. 42.

⁵ *Dabee v Murgur* 2 C. L. R. 208; *Sutyabhama v Krishna*, 1 L. R. 6 Cal. 55; *Ishan v Shama* 1 L. R. 10 Cal. 41.

⁶ *Wooma v Bokoo*, 13 W. R. 333; *Mohur v Ram* 21 W. R. 400.

⁷ *Synd v Shoo*, 19 W. R. 333; *Sreemutty v Radhica* 1 C. L. R. 388; *Bhand v Kalu* 1 L. R. 20 Cal. 708.

thereof¹ If a raiyat has been induced into the land by one of several co-owners or the holder of a life-estate or a mortgagee in possession or even by a trespasser, he is entitled to claim a right of occupancy in the same way, as if he has come into possession at the instance of the absolute and rightful owner It is quite immaterial as to whose tenant he has been, provided he has held the land *bonafide* as a raiyat and has paid rent therefor²

Land must be taken or used for agricultural or horticultural purposes, otherwise no right of occupancy can be acquired³ In *Kalee Kishen Biswas v Sreemutty Fankee and others*⁴, Phear J, is reported to have said—"The occupation intended to be protected by this section (section 6, Act X of 1859) is occupation of land considered as the subject of agricultural or horticultural cultivation and used for the purposes incidental thereto, such as for the site of the homestead, the raiyat or the *mali's* dwelling house and so on I do not think that it includes occupation, the main object of which is the dwelling house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that I had occasion in the case of *Khellut Chunder v Umirto*, reported in the first volume of the Indian Jurist New Series, 426, to consider the matter very fully, and I see no reason now to alter the opinion which I then expressed" The late Justice Dwarkanath Mitter, however, was of a different opinion⁵ His view of the law was the same as that expressed in some of the older cases, but it has been held in almost all the later cases on the subject, that there can be no right of occupancy in land used mainly

X Agricultural or horticultural land

¹ *Zoolfun v Radhica*, 1 L R 3 Cal 560, *sc*, 1 C L R 388

² Pandit Sheo v Ram, 8 B L R 165, *Zoolfun v Radhica*, 1 L R. 3 Cal 560

³ Ramdhun v Haradun, 12 W R 404

⁴ 8 W. R 250

⁵ Rani Durga v Bibi Umdat, 9 B L R 101 *In re Bramamayi*, 9 B L R 109; Brajanath v Lowther, 9 B L R 121.

for any but agricultural or horticultural purposes. In *Mohesh Chunder Gungopadhyaya v Bisho Nath Doss*¹ the question was discussed by Markby J. and he came to the conclusion that it was settled law that the provisions of section 6 of the Rent Acts² could apply only to lands used for agricultural or horticultural purposes.

† Homestead
lands.

No right of occupancy can be acquired in land used for building purposes.³ Neither can the right be acquired in land used for the erection of a school or a church⁴ and no suit for enhancement of rent or even for the recovery of arrears of rent of such lands could be maintained in the Collector's Court under the Rent Act of 1859. Similarly land used for *arhats ghats bazaris* indigo-factories or manufactories cannot come within the purview of the Rent Acts. But if a piece of land has been used by a cultivator for his own habitation and it is a part of an entire agricultural holding he acquires a right of occupancy in it with the rest of the land in the holding.⁵ If a rayat holds his homestead land otherwise than as a part of his agricultural holding the incidents of his tenancy of the homestead land are regulated by local custom or usage, and subject to such local custom or usage the rayat may under the provisions of the Bengal Tenancy Act⁶ acquire a right of occupancy in it. It seems that if a rayat holding land for agricultural purposes holds his homestead land as a different holding in the same village and not as a part of his agricultural holding he has ordinarily the same sort of right in the homestead

¹ 24 W. R. 402.

Act X of 1859; Act VIII (B. C.) of 1869.

† *Kalee v. Kalee*, 11 W. R. 183; *Church v. Ram*, 11 W. R. 347; *Raree v. Bibee*, 17 W. R. 151; *Mudd v. William Steinkert*, 17 W. R. 441; *Moh. r. v. Ram*, 21 W. R. 400; *Rakhal v. Dinomoyi*, I. L. R. 16 Cal. 652.

† *Ranee Shunomoyee v. Blumhardt*, 9 W. R. 352.

† *Pogose v. Rajoo*, 22 W. R. 311; *Mohesh v. Bishanath*, 24 W. R. 402.

† Act VIII of 1885, Sec. 182.

45/182
land as in the agricultural holding¹. The two holdings, in such a case, are inseparably connected with each other. The mere fact of the tenant holding his homestead land and his agricultural holding as separate *jummas*, though under the same landlord, can be no reason for applying different rules of law to them. In a good many districts in Bengal, tenants are allowed to hold homestead land without payment of any rent, as in these districts it is a privilege of the cultivating classes to have land rent-free for habitation. In other districts, local custom or usage entitles the raiyat to pay merely a nominal sum as rent for his *bāstoo* and *udbastoo* lands. Section 182 of the Bengal Tenancy Act intends to protect the raiyats who hold such homestead lands, but the rule laid down therein has nothing to do with other kinds of homestead lands. Under the Hindu system, and, it would seem, even under the Mohammedan system, no rent was levied with respect to the homestead lands of the agricultural population, when they were held as inseparable appurtenances to agricultural holdings.

In some of the districts in Bengal, it is necessary to keep land fallow for a year or two, in order that fertility may be restored. Cultivation for successive years takes away the productive power of the land to such an extent that the raiyat is obliged to have recourse to other pieces of land. Manuring is unknown or is disproportionately costly. In the district of Nadia such lands are known as *utbandi* or *nucksan*². In *Dwarkanath Misree v Noboo Sirdar*³, an *utbandi* tenure is defined to be one "by which the raiyat holds a certain area of land, but for which he pays rent according to the quantity of that land which year by year he cultivates". The rent varies according to

¹ See *Kalee v Sreemutty Jankee*, 8 W R 250, *Pogose v Rajoo*, 22 W R 511; *Mohesh v Bishonath*, 24 W R 402.

² *Prem v Shoorendro*, 20 W R 329.

³ 14 W R 193.

the cultivated area.' Under the Acts of 1859 and 1869 if the raiyat paid rent for the period he could cultivate and did not pay when he could not cultivate, or paid only for as much land as he could cultivate in any year, the holding and cultivation for more than twelve years, though discontinuous gave him a right of occupancy.² Section 180 of the Bengal Tenancy Act has made a material alteration in the status of *utbandi* raiyats. No occupancy right is now capable of being acquired in *utbandi* lands, unless the same piece of land has been held for twelve continuous years.³ Section 19 of the Act, however makes an exception in favour of rights acquired before the commencement of the Act, by operation of any enactment custom or otherwise.

Fisheries.

The right cannot be acquired in *julkars* or tanks when such *julkars* or tanks are not appurtenant to land acquired or held for cultivation.⁴ If a raiyat holds a tank as a part of an agricultural holding the water of the tank being used for domestic purposes or for irrigation or preparation of jute or similar other crops, he acquires a right of occupancy in it.⁵ But he cannot acquire the right in a tank used only for the rearing and preservation of fish when it is not a part of an agricultural holding.⁶

Pasture land.

Pasture land has been held to come within the purview of section 6 of the Rent Acts. The right may be acquired in land used for grazing horses.⁷ But a tenant cannot acquire a right of occupancy merely by the user

Dwarka v Noboo, 14 W R. 193 Prem v. Shoorendro, 20 W R.

399.

Beni v Bhuban, L L R. 17 Cal. 393

Wooma v Gopal, 2 W R (A & X) 19 Siboo v Gopal, 19 W R. 200; Nidhi v Ram 20 W R. 341

Wooma v Gopal, 2 W R (A & X) 19; Siboo v Gopal 19 W R. 200 Nidhi v Ram 20 W R. 341; Sham v The Court of Wards 23 W R. 432; Juggobundhoo v Promotho, L L R. 4 Cal 767 Bolly v Akram 1 L R. 4 Cal. 961

Act VIII of 1885, Sec. 193. Fitzpatrick v Wallace, 11 W R. 231

of pasture land of his landlord, if he does not pay rent for the same, though he may acquire a right in the nature of an easement

The right cannot ordinarily be acquired in land held by the proprietor of an estate or a tenure-holder as his *private land*, known in Bengal as *khamar*, *nij* or *nij-jot*, and in Behar as *sirat*, *nij*, *sir* or *kamat*¹. The distinction between *tenemental* lands and the *lord's domain* is well-known. The lord's domain of feudal Europe resembles in many respects the lands known as *nij-jot* &c, in the Bengal Provinces. In ancient times, the chiefs in India as elsewhere, had lands held and cultivated by themselves, by members of their families or hired labourers, and at the same time, they collected a share of the produce of ordinary raiyati lands as land-tax. In course of time, the chiefs ceased to cultivate the lands themselves or through members of their families, but cultivation by means of hired labour, principally through the aid of the *sudras*, continued for a long time. When the Mahomedan government reduced the native chiefs to the position of zemindars, it allowed the lands which they held as *nij-jot* or *khamar* to remain in their possession, but did not exact any land tax for them. The land-tax that was levied through the zemindars was for lands held by raiyats, artisans and persons following trades and professions. The quantity of land held by each zemindar as *nij-jot* or *khamar* was limited, and the fiscal authorities very seldom permitted him to extend it. The farmers of revenue, who ultimately acquired the rank of zemindars, were also allowed to hold lands of a similar description. The extension of the quantity of *nij-jot* or *khamar* land was, however, not unfrequent, but there is every reason to believe

* Proprietor's
private lands

¹ A & X of 1859, Sec 6, A & VIII (B C) of 1869, Sec 6, A & VIII of 1885, Sec 116, *Gour v Beharee*, 12 W R 277, *Bhugwan v Jug Mohun*, 20 W R 308; *Hurish v Gunga*, 25 W R. 181, *Obhoy v. Kanye*, 1 C L R 394.

that such extension was surreptitious. Encroachments on waste lands and occupation of lands abandoned by rayats, were the principal means adopted by zemindars for increasing the quantity of private lands.

* Proprietary right in waste lands. The proprietary right of the Government in waste lands is a matter of controversy and high authorities have said that waste lands in India theoretically belonged to the various village communities and were capable of being brought under cultivation as soon as there were opportunities for it. There were waste lands and virgin forests lying at a distance from inhabited villages and these would not come within the definition of *the common mark*. In ancient times temporarily uncultivated lands used to form parts of village domains but they would sometime or other be cultivated and thus merge in the *arable mark*. Encroachments on such waste lands by the landlord himself would decrease the quantity of land available for the use of rayats and prevent an increase in the land tax which should have come into the imperial exchequer. The rayats themselves would for obvious reasons resent such encroachments. The Mahomedan government necessarily discountenanced the extension of zemindar's private lands by means of gradual inclusion of parts of the uncultivated waste lands which were reserved by the common law of the country for the use of the peasantry and the increase of revenue. (The Bengal Tenancy Act though it lays down rules for the determination of the character of any land as *rayats* or *private* distinctly contemplates that there should be no extension of the quantity of proprietor's private lands in any village. It excludes uncultivated or waste lands² which according to the established usage of the country have always been reserved for supplying the necessities of life of an ever growing

¹ Mayne's Village Communities, p. 162 (1st Edition).

² Cf. Lecture I, p. 7

population. It makes rules for the record of proprietor's private lands, and such records will effectually prevent land-owners from extending them.¹

When a tenant abandoned his holding or was compelled to abandon by the tyranny of the landlord, the land thus left vacant might be cultivated by the landlord himself for his own profit, until another tenant would come in and occupy it. In theory, the land, notwithstanding cultivation by the landlord himself, would not be a part of his private lands, but would continue to be a part of the *raiyaṭi* lands of the village. It was the duty of the landlord to let out the land to a tenant as soon as one was to be had, and he would commit fraud on the state if he did not do so. As I have already said, surreptitious occupation must have been common, but the land law and the fiscal system of the country required that such lands should be let out at the first opportunity. They could not in olden days, and cannot now be *niṭ-jot* or *sir*

X Lands abandoned by *raiyaṭs*.

The private lands of the zemindars and persons having a similar relation to the peasantry were thus limited in extent, and theoretically incapable of extension. They were not always cultivated or caused to be cultivated by the land-owner himself, they were let out occasionally on rent in specie, but more generally at half the produce or even a smaller share. The letting out, in fact, did not, according to ancient theory, create the relationship of landlord and tenant between the owner of the land and the cultivator, neither did it create in favour of the cultivator any interest in the land so let out. It was really cultivation by hired labour, a share of the produce being taken by the labourer as remuneration or wages. *Vrihaspati*, as quoted in *Paráśramádhava*, says—"The cultivator is entitled to a third or a fifth share of the

X Tenants' right in private lands.

¹ Act VIII of 1885, Secs 117-120

produce"¹ The text occurs in the chapter on *Wages* in *Parāśaramādhyaya*, and the commentator explains that 'a fifth share is due to the cultivator if he receives food and raiment from the owner of the land a third if he does not'² In later days, the share became generally a half instead of a third and hence these cultivators used to be called *ardhasiri*. Half the produce was deliverable to the land owner by the cultivator not as rent, but the land owner who was entitled to cultivate the land himself or by hired labour allowed him to retain a half as the price of his labour. The theory of law at the present day, is that payment to the landlord in kind is as much rent as payment in specie but the prevalent notion amongst the people and the general practice with reference to *nij jot* lands are more in harmony with the rule laid down by the sage *Vrihaspati*. Wherever the Rent Acts have not made much impression a cultivator holding land on terms of payment in kind, has not, in practice, that amount of stability as an occupancy raiyat ought to have, but is liable to be ejected at the end of any agricultural year. The principle that underlies the rules laid down in the Acts of 1859 1869 and 1885 is that the proprietor is entitled to hold and cultivate *nij jot*, *sir* or *sirat* land by hired labour in any year he pleases. The mere occupation for a number of years by a raiyat does not make the land *raiya*, and deprive the landlord of the right of re-entry at the end of any agricultural year. The raiyat cannot acquire a right of occupancy or even the status of a non occupancy raiyat simply by occupation and

¹ विभावं पञ्चभावं वा मङ्गीयान् सीरवाहकः ।—Parasara Smṛiti, Calcutta A. S. Publication, Vol. III., p. 231.

² भन्ताच्छादयत सीरादुभावं मङ्गीत पञ्चकम् ।

शावकान् विभायन् प्रमङ्गीयान् दवाहयत ॥ Parasara Smṛiti Calcutta A. S. Publication, Vol. III p. 231.

payment of rent, as he may with respect to ordinary *raiyaṭi* lands.¹

But notwithstanding that a piece of land was originally the private land of the proprietor, he may by his conduct waive his right to hold it as non-*raiyaṭi* and may make it *raiyaṭi* The Settlement Regulation² included in the assessment of land revenue the profits of *nankar*, *khamar*, *nij-jot* and other private lands as of ordinary *malgoosari* or *raiyaṭi* lands This Regulation did not lay down any rules as to the rights of the land-lord with respect to these lands in relation to the *raiyaṭs* The words of the Regulation, however, are clear, as indicating a distinction between *malgoosari* or *raiyaṭi* lands and non *malgoosari* or non-*raiyaṭi* lands The Rent Acts provide that if any land, being *nij-jot*, *khamar* or *sir*, has been held under a lease for a term of years or under a lease from year to year, the *raiyaṭ* does not acquire therein a right of occupancy or the right of a non-occupancy *raiyaṭ*³ But if the holding of the land by the tenant be for other than for a term of years or from year to year, it is impressed with the character of ordinary *raiyaṭi* land, and the tenant may acquire a right of occupancy therein⁴

X
An excep-
tion

Questions of difficulty frequently arise in determining whether any particular piece of land in a village is *raiyaṭi* or non *raiyaṭi* It is always to the benefit of the *raiyaṭs* that it should be declared to be a part of the *raiyaṭi* lands of the village, while the proprietor would have as much non-*raiyaṭi* land as is possible The burden of proof is on the landlord, the presumption of law being that no land is *khamar*, *sir* or *nij-jot*, until the contrary is proved⁵ It is

X
Distinction
between
raiyaṭi and
non-*raiyaṭi*
lands

¹ Aēt VIII of 1885, Sec 116

² Reg VIII of 1793, Sec. 39

³ Aēt X of 1859, Sec 6, Aēt VIII (B C) of 1869, Aēt VIII of 1885, Sec. 116 See *Bhugwan v Jugmohun*, 20 W. R 308, *Shaikh Ashruf v Ram*, 23 W R 288

⁴ *Gour v Beharee*, 12 W R 277

⁵ Aēt VIII of 1885, Sec 120, Sub-Sec 2.

not easy, however, to give evidence as to the character of the land had at the date of the Permanent Settlement and the Bengal Tenancy Act has accordingly laid down in section 120 rules for determining what lands should be considered to be private. Under that section, cultivation by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of the Act if cultivated as *khamar &c* is sufficient evidence for proving any piece of land to be private. Recognition by village usage even if the land is ordinarily let out to tenants is also sufficient to make any piece of cultivated land *khamar nijot* or *sir*. Local custom or village usage is undoubtedly very good evidence as to the character of any land in the absence of other direct and reliable evidence.

† Private Lands
belonging to
tenure-
holders

The Bengal Tenancy Act, you will notice speaks only of the private lands of *proprietors* i.e. persons owning an estate or part of an estate. The Rent Acts of 1859 and 1869 spoke of the *proprietor* of an estate or *tenure*, and they evidently meant tenure holders who succeeded in obtaining leases of entire villages including *raiya* as well as *non raiya* lands. The character of any piece of land should not change by the mere transfer by the proprietor of his right by way of a *putni* or leases of a similar nature. An *ijaradar* or a *thiccadar* holding a village would by virtue of his lease have the same sort of right in the private land of the proprietor as the proprietor himself. By the expression *proprietor's private lands* used in the Bengal Tenancy Act, we are not to understand that only persons who are *proprietors* within the meaning of the Act are capable of having *private* lands, the expression refers only to the origin i.e. the nature of the land as held at the time of the Permanent Settlement,—

mj, *mj-jot*, *su*, *suat*, *khamar*, *kamat*, as distinguished from *malgoozari* or *raiya* lands

The Bengal Tenancy Act has also made an exception to the acquisition, in the ordinary mode, of occupancy right in *chur* and *dearah* lands¹ *Chur* or *dearah* is a piece of new-formed land by the action of the sea or a river. The Bengal rivers frequently shift their courses, and the formation of islands in the midst of rivers is not unfrequent. Under the provisions of Regulation XI of 1825 and Act IX of 1847, the Government officers are required to survey and measure these new-formed lands to enable them to ascertain what rights the Government has in them, and to assess them when necessary. Such surveys are technically known as *dearah*. These lands are under the frequent risk of being diluviated, and they are also temporarily unculturable by reason of their being low or sandy. The Legislature has, therefore, provided that the mere fact of occupation of such lands as a *raiya* by a *settled raiya* is not sufficient to create any right of occupancy in them. *Chur* or *dearah* lands may, however, in due course of time be so permanent in character that the Collector of a district may deem it proper to declare that they have ceased to be *chur* or *dearah*, and then a cultivator may acquire a right of occupancy in them in the same way as in any other land.²

Chur and
dearah lands

Under section 6 of Act X of 1859 and Act VIII(B C) of 1869, the acquisition of the right depended upon possession for a period of at least twelve years and payment of rent, the material words used being—"in the land so cultivated or held." The right could be acquired only in the particular piece or pieces of land held and cultivated by a *raiya* for the required number of years. The Bengal Tenancy Act has made a material addition as to the means of the acquisition of the right,

† Right acquired by occupation for twelve years.

¹ Act VIII of 1885, Sec 180

² Act VIII of 1885, Sec 180, Sub-Sec 3.

except as to *utbandi chur* or *dearah* lands. A settled raiyat may now acquire the right in any land held by him in the village in which he is such a raiyat even if the period of occupation be much shorter than twelve years¹. For him, occupation for twelve years is not necessary. As soon as he touches a piece of land as a raiyat he acquires an occupancy right in it.

* *Pundit Sheo
Prakash v
Ram Sahay
Singh.*

Section 6 of Act X of 1859 and Act VIII (B C) of 1869 laid down that a raiyat could acquire a right of occupancy by twelve years occupation whether he held under a pottah or not, and section 7 made an exception that the provisions of section 6 of the said Acts would not affect 'the terms of any written contract for the cultivation of land when it contains any express stipulation contrary thereto'. The question as to the effect of occupation under successive written leases for terms of years aggregating to more than twelve years, or under a single lease for a period of more than twelve years was raised in several cases and there were conflicting judgments. The matter ultimately came before a Full Bench of the Calcutta High Court in *Pundit Sheo Prakash v Ram Sahay Singh*². The whole question, said Couch, C J 'turns upon what is the meaning of an express stipulation contrary to the raiyat acquiring the right of occupancy. Now where there is a pottah for a fixed term, no doubt at the expiration of that term the landlord has a right of re entry upon the land and if the raiyat does not give up possession the landlord may recover the land from him. The landlord need not re-enter upon the land if he does not think fit he may and often does allow the tenant to remain in possession of the land. I cannot consider that the right of re entry which arises by reason of the expiration of the term named in the pottah can be re

¹ Act VIII of 1885 Secs. 20 & 21. Ante p. 305.
² 17 W. R. F. B. 62, 8 B. L. R. 165.

garded as an express stipulation that the raiyat shall not, if he occupies the land for more than twelve years, acquire the right of occupancy given by section 6'' The law, as interpreted in this decision and the other decisions¹ that follow it, seems to be, that whether a raiyat held under a single lease or under different leases following one after the other, he acquired a right of occupancy in the land so held by him, provided the entire period of occupation exceeded twelve years, and provided there was no express covenant for re-entry by the landlord at the expiration of any one of them. An implied covenant for re-entry was not sufficient to defeat the statutory right which could be acquired by a raiyat by twelve years' occupation. An express covenant for re-entry, however, entitled the land-lord to eject the raiyat at the end of the term, but if the landlord allowed the raiyat to hold on after the expiration of the term of the lease, he was entitled to add the period of his occupation under the lease to the subsequent period, and if the total period exceeded twelve years, the raiyat acquired a right of occupancy.² Where the landlord showed, by his acts and conduct and specially by receipt of rent for any period subsequent to the expiry of the lease, an intention to allow the raiyat to hold over, the tenancy became one from year to year, and as regards *raiya* lands, this was enough to give him the status of an occupancy-*raiya*, as soon as possession for the statutory period of twelve years was completed. But if the landlord showed by some overt act his intention of taking possession on the expiry of the written lease, and merely delayed in bringing his suit for ejectment, and did not accept rent from him for any subsequent period, the landlord's right to re-enter was not gone, and he could bring his suit with-

X
Covenant for
re entry

¹ *Golam v Hurish*, 17 W R 552, *Narain v Munsur*, 25 W R. 155

² *Ebadutoollah v Mahomed*, 25 W R 114, *Mukhtar v Brojraj*, 9 C L R 143

in twelve years of the date of the termination of the tenancy, when his cause of action arose.¹ The Bengal Tenancy Act has however, laid down that a raiyat acquires the right by occupation for twelve years whether he holds ' under a lease or otherwise. So that he acquires the status of a settled raiyat after the continuous holding of land in a village for the period of twelve years, whether there is a covenant for re entry or not. He may hold one piece of land for five years another for four and a third for three and he then becomes a settled raiyat and has a right of occupancy in any piece or pieces of land so held by him either at the end of or subsequent to the twelve years. As we have seen the Legislature has imported the idea of a *khod kasi* raiyat, and has given his status to any person holding any land in the village for a continuous period of twelve years, notwithstanding that the particular pieces of land held by him have been different at different times. Section 178 of the Bengal Tenancy Act sub-section 1, clauses (a) and (b) has laid down a rigid rule as to contracts made before or after the passing of the Act and occupation as provided for in sections 20 and 21, creates a right of occupancy, and nothing in any contract shall bar the acquisition of or take away the right. A covenant for re entry will not entitle the landlord to eject a tenant from the land held by him and there is no provision in the Act for the ejectment of a settled raiyat on the expiry of the term of his lease the law limiting the grounds of ejectment to those contained in section 25 of the Act only. Such a covenant for re entry is now invalid and is not enforceable. A tenant acquires the status of a non occupancy raiyat as soon as he is admitted to the occupation of any piece of land, and a right of re-entry is not easily enforceable by the landlord

¹ *Kabool v Radha*, 16 W R. 145

In *Thakoorance Dossee v Bisheshur Mookerjee*,¹ the High Court held that the holding of land for twelve years, whether wholly before or wholly after, or partly before and partly after the passing of Act X of 1859, entitled a raiyat to a right of occupancy, and the Bengal Tenancy Act has expressly laid down the same rule of law in the words, "wholly or partly before or after the commencement of this Act"² A raiyat is also entitled to the benefit of the occupation by his father or other person from whom he has inherited "A person shall be deemed to have held as a raiyat any land held as a raiyat by a person whose heir he is"³

† Holding partly before and partly after the passing of the Rent Act.

The continuity of a raiyat's occupation may, however, be broken by wrongful action on the part of the landlord, such as forcible ouster. In such a case the landlord, after the tenant has recovered possession by a suit or otherwise, ought not to be allowed to take advantage of his own wrongful act, and say that the continuity has been broken and no right of occupancy has been acquired⁴. So, also, if the landlord enters into the land after alleged abandonment by the tenant, and the tenant afterwards succeeds in recovering possession by a suit under section 87 of the Bengal Tenancy Act, the latter shall not lose his right of pleading continuity of possession, notwithstanding that he has intermediately been out of possession for more than a year.

† Dispossession by landlord

When land is held by two or more co-sharers as a raiyat holding, each of them holds as a raiyat and

† Holding by co-sharers

¹ B L R (F B) 202, sc, 3 W R, (Act X) 29

² Act VIII of 1885, Sec 20, Sub-Sec 1

³ Act VIII of 1885, Sec 20, Sub-Sec 3. And see Act X of 1859, Act VIII (B C) of 1869, Sec 6. *Watson v Shurut*, 7 W R 395; *Nimchand v Mooraree*, 8 W R 127, *Lal v Solano*, 1 L R 10 Cal 45, sc, 12 C L R 559

⁴ Act VIII of 1885, Sec 20, Sub-Sec (6) *Lutteefunnissa v Poolin Beharee*, W R, Sp Vol, (F B) 91, *Mahomed Gazee v Noor Mahomed*, 24 W R, 324

acquires a right of occupancy ¹ The mere fact of joint holding by a number of persons does not prevent the right as to the entire land growing in any one of the joint tenants or tenants in common The decisions under Acts X of 1859 and VIII (B C) of 1869, however, are not uniform, as indeed they do not expressly lay down any rule as to the right of one out of a number of tenants holding jointly *

X Holding of private lands

As regards the private lands of proprietors when held by raiyats the acquisition of the right does not depend merely upon occupation and payment of rent for twelve years as in the case of ordinary raiyati lands The right cannot be acquired when such lands are held ' under a lease for a term of years or under a lease from year to year ' it would seem specially having regard to the provisions of section 178 of the Bengal Tenancy Act that the Legislature has not thought proper to impose any restrictions on contracts of leases of non raiyati lands A lease for a term of years whether there is any express covenant for re-entry or not, entitles the landlord to re-enter his private lands and whether the raiyat holds under one lease or successive leases possession for twelve years gives him no right to hold on No right of occupancy accrues if the holding is under leases renewed year after year whether they are verbal or written *

† Effect of non payment of rent.

Non payment of rent does not bar the acquisition of the right * neither does it involve the forfeiture of the right when once acquired * Under Act X of 1859,

† Act VIII of 1885 Sec 20 cl. 4

Sheikh Mahomed v Ramprasad, 8 B L. R. 338; A. J. Forbes v Ramlall 22 W. R. 51

† Act X of 1859, Sec. 6; Act VIII (B C) of 1869, Sec. 6 and Act VIII of 1885, Sec. 116. Gourhuree v Beharoo, 12 W. R. 277; Hurlah v Gunga, 25 W. R. 181

Gour v Beharoo 12 W. R. 277 & 3 B L. R. App 138; Bhugwan v Jugmohan 20 W. R. 308; Ashraf v Ram Kishore 23 W. R. 288.

† Narnin v Op It L. L. R. 9 Cal 304, & 11 C. L. R. 417

* Musyatulla v Noorzahan L. L. R. 9 Cal 808; Brojendro v Bungo 12 C. L. R. 389; Nilmony v Sonatun, 1 L. R. 15 Cal 17

the High Court held that when a tenant had held for a period of twelve years as a raiyat, non-payment of rent for some years did not extinguish the right. In *Naram Roy v Opnit Misser*¹, it was held that for the acquisition of a right of occupancy, only two conditions were necessary—(1) the cultivation or holding of land for a period of twelve years, and (2) that the person holding or cultivating land should be a raiyat. Non-payment of rent might be a valid ground for holding that the land was held not by a raiyat but by a trespasser. The maintenance of the right is dependent upon payment of rent but not the acquisition of it. But the failure of a tenant to pay rent only entitled the landlord to re-enter by ejectment under the provisions of section 78 of Act X of 1859 and section 52 of the Bengal Act VIII of 1869, the tenant having under them the right to protect himself by the payment of the arrears and costs within fifteen days of the date of the decree. Non-payment of rent before suit did not by itself cause a forfeiture of the right of occupancy already acquired by a raiyat.

During the continuance of the relationship of landlord and tenant, the main duty of an occupancy-raiyat is to pay his rent regularly, as indeed it is the primary duty of all tenants to their landlords. The rate of rent is generally determined by contract, and in the absence of a written contract, oral evidence is always admitted. If a written lease exists, it is provable in the ordinary way. Unless the contract has been entered into, subsequent to the passing of the Bengal Tenancy Act, rent is payable at the contract rate, if the contract is otherwise valid. But if the contract is one executed after the Bengal Tenancy Act came into force, and, in districts where that Act prevails, the contract rate must be evidenced by a written instrument duly registered by the tenant, if the rent payable is higher than that paid before. The enhanced rate must not also ex-

X
Raiyat's duty
to pay rent

ceed the rent previously payable by more than two annas in the rupee ¹ & one eighth. No rent at enhanced rate is also allowable for fifteen years from the date of the previous enhancement ². A contract in contravention of any of the special provisions as to occupancy rayats is invalid in law, and a suit for rent on such a contract is liable to be dismissed except as to the rent previously payable. But any arrangement in settlement of a dispute as to the amount and character of the rent is not rendered invalid by the operation of the Act ³ nor is the landlord debarred from recovering rent at an enhanced rate, when it has been actually paid for a continuous period of not less than three years immediately preceding the period for which rent is claimed by the landlord ⁴. The contract is not also invalid if the enhanced rent is payable on account of an improvement effected at the expense of the landlord, and the improvement exists and substantially produces its estimated effect ⁵. If the productive power of any piece of land has been increased by any work carried out under the provisions of the Bengal Drainage Act of 1880 ⁶ the landlord is entitled to enhanced rent in accordance with the valuation under the Act and the restriction imposed by the Bengal Tenancy Act does not apply. It is valid when the land has been held at a specially low rate of rent in consideration of the cultivation of any particular crop such as indigo for the convenience of the landlord ⁷. These provisions in the Bengal Tenancy Act restraining the right of free contract are intended for the wisest purpose—the protection of the weak and the unlettered from the strong hand of the landlord.

A& VIII of 1885, Sec. 29, cls. (b) and (c).

Shao v. Ram, 1 L. R. 18 Cal. 333.

² A& VIII of 1885 Sec. 29, proviso (1).

Ibid, proviso (2)

A& VI (B C) of 1880, Sec. 42 ()

A& VIII of 1885, Sec. 29, proviso (3).

If no written contract exists, the amount of the tenant's annual rent payable in any particular year is generally the rent paid in the last preceding agricultural year¹ Oral evidence of enhancement of rent, even when it is admissible, is seldom believed The landlord generally attempts to prove that rent has been in previous years paid at the rate claimed Oral evidence is usually supplemented by zemindari papers known under various names — jumlabandis, jumawasils, thokas, karchas, shehas, &c, and now-a-days, check counter-foils The question of the admissibility of these papers, their use as corroborative evidence and the mode of proving them properly fall within the scope of the Law of Evidence

Rent is usually payable in instalments, though payment in one lump sum at the harvest time or at the end of the agricultural year is not uncommon The instalments are regulated by agreement or established usage² An agreement as to instalments need not be evidenced by a written instrument Where no agreement is proved or is provable, *established usage* of the pergunah or the local area in which the holding lies, and not the practice of payment by the raiyat for a long series of years in proof of local usage, may be proved³ If there be an agreement or local usage for payment in monthly instalments, rent is recoverable monthly, notwithstanding that the practice with reference to a long period or any particular person has been different⁴ The Bengal Tenancy Act has made rent payable in quarterly instalments with reference to the agricultural year, if

¹ Act VIII of 1885, Sec 51 Enayutoollah v Elaheebuksh, W R, 1864, (Act X) 42, Jumaut Ali v Chutturdharee, 16 W R 185; Tara v Ameer, 22 W R 394

² Act X of 1859, Sec 20, Act VIII (B C) of 1869, Sec 21 and Act VIII of 1885, Sec 53

³ Chytunno v Kedar, 14 W R 99, Hira v Mothura, I. L. R. 15 Cal 714, Watson v Sreekristo, I L R 21 Cal 132

⁴ Pearce v Brojo, 21 W, R 36, 22 W R 428.

(there be no proof of an agreement or established usage¹ A decree for rent at any previous period, in which the question of instalments as based upon an agreement or established usage was decided is very good evidence, and may be used between the parties but if the decree directed payment at the end of the year without any finding as to intermediate instalment based on any agreement or established usage it is not sufficient evidence to override the law as laid down in the Bengal Tenancy Act.² Under the Acts of 1859 and 1869, rent, in the absence of any contract or established usage to the contrary was payable annually at the end of the agricultural year

✓ Where is rent payable

Rent becomes due at the last moment of the time which is allowed to the tenant for payment which is the sunset of the day on which an instalment falls due.³ It is ordinarily the duty of the tenant to tender payment at the *malcutchery* or village office of the landlord.⁴ If no payment is made at or before the time, the amount payable becomes an arrear of rent.⁵

Interest.

Interest is payable on arrears of rent. The rate of interest is generally regulated by contract which may be either written or verbal. If there be no contract evidence may be given of local usage or the practice for a long series of years. But wherever the Bengal Tenancy Act prevails, no contract, entered into subsequent to the passing of the Act (14th March 1885), for payment of simple interest at a rate higher than twelve per centum per annum is valid.⁶ If the contract was entered into before that date interest is payable according

¹ Act VIII of 1885, Sec. 53; *Hemanta Kumari v Jagadindra*, I. L. R. 22 Cal. 214.

Act VIII of 1885 Sec. 53.

Kasbi v. Rohini I. L. R. 6 Cal 325

² Act VIII of 1885, Sec. 54 (2).

— ³ Act VIII of 1885, Sec. 54 (3).

Act VIII of 1885, Sec. 178, Sub-Sec. 3, cl. (b)

to the contract. In the absence of evidence as to contract or local usage, interest at twelve per centum per annum was payable under Act X of 1859, though it was discretionary with the Court in any case to allow it or not ¹ The Bengal Tenancy Act has taken away the discretion, and interest at twelve per centum per annum is always leviable, if there is no contract or local usage to the contrary. If no contract or local usage be proved, interest is payable from the expiration of each quarter of the agricultural year in which the instalment falls due ². But the rule is subject to the proviso to section 53 of the Bengal Tenancy Act.

The Court may, in substitution of interest, award damages not exceeding twenty-five per centum on the amount of the principal rent decreed. But there can be no decree for both interest and damages ³.

Damages

The rent and interest or damages are payable to the landlord, but the question frequently arises—Who is the landlord? You have already seen that a tenant, holding even under a trespasser, acquires a right of occupancy, and the true owner of the land cannot eject him, but he is entitled only to rent ⁴. Succession and transfer, and devolution of interest in the various ways recognised by law are frequent, forcible ouster of the true landlord is also not unfrequent. Boundary disputes between adjoining landlords are also very common. Thus the difficulty of finding out the true landlord is sometimes very great. You will frequently meet with cases, especially of *chur* lands, in which you will find the raiyats choosing their own landlords and changing them as often as they please.

Who is the rent receiver?

¹ *Kashee v Mynuddeen*, 1 W R 154, *Radhika v Urjoon*, 20 W R. 128, *Beckwith v Kisto*, Marsh 278

² Act VIII of 1885, Sec. 67

³ Act VI (B C) of 1862, Secs 2 and 3, Act VIII (B C) of 1869, Secs 44 and 45, Act VIII of 1885, Sec 68 *Nobo v Baroda*, 1 W.R. 100

⁴ Ante pp 314-315.

Registered
owner under
Act VII
(B.C.) of
1876.

Where the holding of a raiyat is directly under a proprietor (as the word is defined in the Bengal Tenancy Act), and is a part of an *estate* rent is payable to the person whose name is registered under the Land Registration Act of 1876.¹ Not only is an unregistered proprietor not entitled to sue for rent but the Bengal Tenancy Act lays down that a person liable for the rent is not entitled to plead, in defence to a claim by the person so registered, that the rent is due to any third person.² The raiyat has only to go to the Collectorate of the district and enquire who the person is whose name is registered in the Collector's Register and he is bound to pay him rent and is by such payment fully indemnified against the claim of any other person. No question of title can therefore arise in a rent suit by a registered proprietor. Registration under Act VII (B.C.) of 1876 was not sufficient to give a title to claim or recover rent under the Act of 1859. It was necessary to prove the relationship of landlord and tenant by other evidence.³

Intermediate
tenure
holders.

Intermediate tenure holders are not under any disability with respect to the realization of rent from raiyats, on account of the non registration of their names in the books of their superior landlords. But in districts in which the Bengal Tenancy Act has operation, and the person suing for rent is an heir of the last recorded permanent intermediate holder or a transferee from him registration in the landlord's office is necessary. The person succeeding to a permanent tenure is not entitled to recover rent by suit or any other proceeding under the Act, until the Collector of the District has received the notice and fees prescribed in it.⁴ But the rule does not apply when the succession opened out before the Act came into force.⁵

1. Act VII (B.C.) of 1876 Sec. 78. 2. Act VIII of 1885 Sec. 60.

3. Ram v. Sheikh Haral. I. L. R. 9 Cal. 517

4. Act VIII of 1885, Secs. 15 and 16.

5. Profullah v. Samiruddin. I. L. R. 22 Cal. 337

As the law at present stands, the following rules may be laid down for determining whether the relationship of landlord and tenant exists —

X Rules for determining the relationship of landlord and tenant

(a) If the raiyat holds under a duly registered lease, or a written lease admissible without registration, the lease itself, *prima-facie*, proves the relationship, and the raiyat is bound to pay rent to the lessor. On the death of the lessor, his legal representative is entitled to the rent, as soon as his name is registered in the superior landlord's office under the provisions of sections 15 and 16 of the Bengal Tenancy Act. In a case of transfer, voluntary or involuntary, or sublease by the tenure-holder, proof of transfer or sublease entitles the transferee or the lessee to receive rent. But the raiyat, if he has not been induced into the land by the lessor mentioned in the written contract, is always entitled to show that the lessor had no title at the date of the execution of the lease and that another person is entitled to realise rent ¹. A raiyat claiming a right of occupancy, even if he has been induced into the land by the lessor, is entitled to show that he took the lease from a wrong person, and that the rent is really payable to another. He is not estopped by the provisions of section 116 of the Indian Evidence Act. The burden of proof, however, in such a case is upon the raiyat ².

Written lease

(b) Where there is no written lease and no direct evidence of a verbal contract of lease, proof of payment of rent in previous years and the conduct of parties may afford very good evidence of the existence of the relationship of landlord and tenant. Payment of rent is the most cogent evidence of an admission of the relationship of landlord and tenant. But the raiyat is always

Proof of payment of rent

¹ Baney v Thakoor, 6 W R., Aft X, (F B) 71, Kedar v Mrs B Donzelle, 20 W R 352, Ranee v Ranee, 24 W R 101, Lal v Kallanus, 1 L R 11 Cal 519

² Lodai Mollah v Kally, 1 L R 8 Cal 238

entitled to show that he has been paying the rent of his holding to a wrong person. Payment of rent is generally proved by the production and proof of zemindari papers such as *jurima wasil baki papers thokas*, *kurchas shehas* and counterfoils of *dakhilas*—*check moories*. As to the probative force of these papers, which are the private papers of the landlord, opinions vary.

Proof of title.

(c) The relationship may also be proved by proof of title, as the true owner is entitled to rent unless he is out of possession. A raiyat setting up the title of a third person and depositing the rent of his holding in Court is in the position of a plaintiff in an interpleader suit though no tenant is himself entitled to bring such a suit¹. In the case of a deposit after suit, the Bengal Tenancy Act has provided that a notice should be served upon the person who is represented to be the true landlord² and a title suit between the plaintiff in the rent suit and such third person decides who is the true rent receiver³. If there is no deposit of rent by the raiyat the third person whose title is set up by him receives no notice and the rent suit has to be fought out between the plaintiff and the raiyat. Proof of title is some evidence of the relationship of landlord and tenant. But such proof alone is not sufficient to entitle a plaintiff to get a decree for rent.

Possession

(d) It has sometimes been said that proof of present possession is sufficient to entitle a plaintiff to realise rent. This to me is unintelligible unless present possession and previous receipt of rent are in law synonymous expressions. General evidence of possession by receipt of rent from other raiyats is not relevant in an enquiry as to the relationship of landlord and tenant.

Use of land

During the existence of the relationship of landlord and tenant, the tenant is entitled to make such use of

Cf Act XIV of 1882, Sec. 474.

Act VIII of 1885 Sec. 149.

X *Ibid* Sec. 149. See *Jagdamba v Protap*, 1 L. R. 14 Cal. 537; *Rubluinnessa v Goolja*, 1 L. R. 17 Cal. 829.

the land as is consistent with the original purpose of the tenancy¹ He is not entitled to change the character of the land, so as to make it unfit for the purpose for which the tenancy was created But he is entitled to make improvements under the rules laid down in the Bengal Tenancy Act, Chapter IX²

Rent may be realized by distraint or by suit instituted under Chapter XIII of the Bengal Tenancy Act The provisions about distraint are applicable only to arrears of the current year³ A suit for rent is entertainable for the arrears of the current year and those of back years, the rule of limitation being three years from the last day of the Bengali year in which the arrear falls due where that year prevails, and the last day of the month of Jeyt of the Amli or Fashi year in which the arrear falls due, where either of these latter years prevails⁴

X Modes of realizing rent

Under the Rent Acts of 1859 and 1869, the right of an occupancy-ryyat could be determined for non-payment of rent, for the breach of any condition of the contract of lease express or implied, by denial of the landlord's title, by surrender, by abandonment and by merger

† How may occupancy right be extinguished

I have already dealt with cases of non-payment of rent and breaches of conditions, as well as disclaimer⁵

Non-payment^o of rent &c

Surrender and abandonment are extremely rare To avoid the difficulties which frequently arise on pleas of relinquishment and abandonment by tenant, the Bengal Tenancy Act has made special provisions in sections 86 and 87⁶

Surrender and abandonment^o

The transfer by a ryyat of a non-transferable right of occupancy is not only invalid, but it extinguishes the right itself The transferor is supposed to have abandoned the holding, and the transferee acquires no right under the void contract of sale and is considered to be a trespasser Sir Richard Couch observed in the Full

X Effect of transfer

¹ Cf A&T VIII of 1885, Sec. 23

² Vide pp 300—301

³ A&T VIII of 1885, Sec. 121

⁴ A&T VIII of 1885, Schedule III, Art. 2

⁵ Vide p 307

† *Nurendro
Narain Roy
v. Ishan
Chunder Sen*

Bench case of *Nurendro Narain Roy v. Ishan Chunder Sen*—"If a raiyat having a right of occupancy endeavours to transfer it to another person and in fact, quits his occupation and ceases himself to cultivate or hold the land it appears to me that he may be rightly considered to have abandoned his right and that nothing is left in him which would prevent the zemindar from recovering the possession from the person who claims under the transfer. And not only may he be considered to have abandoned it but if the right which is given by the law is one which exists only so long as he holds or cultivates the land when he ceases to do that by selling his supposed right and putting another in his place his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not so the law would become nugatory. The position of things would be that the transfer by the raiyat is invalid and gives the transferee no right to the possession but the raiyat could not recover possession from the transferee as he would be bound by his act of transfer nor could the landlord recover possession because the outstanding right to the raiyat would be to his way. The result would be that although the transfer is invalid the transferee would be able to keep possession and to set the landlord at defiance. This was a case under the Act of 1869 but it has been followed in cases under the Bengal Tenancy Act notwithstanding that under the latter Act an occupancy raiyat has not merely the right to hold and cultivate but has a higher right—freedom from ejectment for non payment of rent and a right to the surplus sale proceeds on a sale for arrears of rent. Even if the transferor continues to hold the land but as a lessee under the transferee—as an under raiyat there is an extinguishment of the right of occupancy

X 23 W R 22, 24 13 B L R 274. See *Kaloo v. Ram*, 9 W R 3441
Dwarka v. Hurrah 1 L R 4 Cal 925; *Kripa Durga*, 1 L R 15
Cal 89.

The transfer, however, of a portion of a holding does not extinguish the right of the transferor to the whole or even the part of the holding thus transferred. Such an act on the part of the tenant is not deemed to be an abandonment, so as to entitle the landlord to re-enter.¹

X Transfer of a part

Where a transfer without the landlord's consent is valid according to custom or local usage, the registration in the landlord's office of the name of the transferee is necessary for the benefit of all parties concerned. The landlord ought to know who is the person in actual occupation as raiyat, the raiyat who has sold his holding ought to be freed from liability for rent, after the cessation of his interest, and the transferee should have the advantage of having notices of suits for arrears of rent. The Rent Acts of 1859 and 1869 required the registration of the names of intermediate holders between the zemindar and the raiyat, but not of raiyats,² though it was held in some cases that the registration of the names of raiyats was necessary. The law as to tenure holders was frequently misapplied to the cases of raiyat holdings. The Bengal Tenancy Act has now provided—"When an occupancy-raiyat transfers his holding without the consent of the landlord, the transferor and transferee shall be jointly and severally liable to the landlord for arrears of rent accruing due after the transfer, unless and until notice of the transfer is given to the landlord in the prescribed manner."³ The notice of transfer is thus essentially necessary to relieve the outgoing tenant, and it would seem that, until such notice is served in accordance with the rules

o Registration of transfers and notice

¹ *Debiruddi v Abdur*, 1 L R 17 Cal 196, *Kabil v Chunder* 1 L R 20 Cal 590. *Bansi alias Raghu v Jagdip*, 1 L R 24 Cal 152, *Durga v Doula* 1 C W N 160, *Kali v Kumar Upendra*, 1 C W N 163, *Sri Maharajah Krisan v Mr J R Tripe*, 1 C W N cclxxix.

² Act VIII (B C) of 1869, Sec 26. *Sutteesh v Muddoo*, W R., 1864, (Act X) 94, *Uma v Hari* 1 B L R S N 7, *sc.*, 10 W R 101.

³ Act VIII of 1885, Sec 73.

prescribed by the Local Government in that behalf, the landlord is not bound to recognise the purchaser as his tenant and any action against the original tenant will bind the purchaser notwithstanding that he is not a party to it. The due service of notice on the landlord operates as registration in the landlord's office, and no suit for registration is therefore necessary¹.

O
Merger

Extinguishment of the right of occupancy by merger is provided for in section 22 of the Bengal Tenancy Act. Under the Rent Acts of 1859 and 1869 there was no legal bar to the two rights, the right of a tenure holder and occupancy right—being in the same individual. But section 22 of the Bengal Tenancy Act provides that when the immediate landlord of an occupancy holding is a proprietor or permanent tenure holder and the entire interests of the landlord and the raiyat in the holding become united in the same person by transfer succession or otherwise the occupancy right shall cease to exist. If the right is transferred to a person jointly interested as proprietor or permanent tenure holder it shall also cease to exist. An ijaradar or farmer of rents shall also not acquire a right of occupancy in any land comprised in his ijara or farm.

9x
Who is a
non-occupan-
cy raiyat.

Under the law, unaffected by the provisions contained in the Bengal Tenancy Act, raiyats holding lands at unchanged rates of rent from the time of the Permanent Settlement, enjoy the privileges of fixity of rent and freedom from liability to ejection, and raiyats having rights of occupancy are entitled to hold on from generation to generation as long as they pay rent at fair and equitable rates but those who have cultivated or held lands for periods shorter than twelve years are liable to be ejected at the end of any agricultural year on proper and reasonable notice to quit, unless they are

But see *Ambika v. Chowdhry* 1 L. R. 24 Cal. 642.

protected by express conditions contained in their leases Under the Bengal Tenancy Act, however, every raiyat, whatever the class to which he belongs, enjoys protection from eviction, except under certain specified conditions,¹ as soon as he is admitted to the occupation of *raiya* land in any village, and even when he holds for a term of years under a contract in writing duly registered, he cannot, under any circumstances, be ejected at the end of the term, unless notice to quit has been served on him not less than six months before the expiration of the term and unless a suit for ejectment is instituted within six months from the expiration of the term.² If he has held for a shorter period than twelve years, the Bengal Tenancy Act calls him "a non-occupancy raiyat," and he is defined to be—"a raiyat not having a right of occupancy in the land held by him."³ Neither is the expression "non-occupancy raiyat" a happy one, nor is the definition strictly logical. As I understand the expression, it means and includes that large class of raiyats holding *raiya* lands, who neither hold at fixed rates from the time of the Permanent Settlement nor are occupancy-raiyats. The Act has not defined the incidents of such a tenancy, except as to protection from eviction by the landlord and the rate at which rent is payable. It should, however, be remembered that the Act does not pretend to define exhaustively all the incidents of the various kinds of tenancies known in this country. Questions must and do frequently arise, which cannot be answered from the text of the Bengal Tenancy Act, and lawyers and judges are obliged to have recourse to well-known customs or local usages or customary laws and rules of equity and good conscience. Section 183 of the Act saves the operation of "any custom, usage or cus-

Incidents

¹ Act VIII of 1885, Sec. 44² Act VIII of 1885, Sec. 45³ Act VIII of 1885, Sec. 4, Sub-Sec. 3, cl (c)

tomary right not inconsistent with or not expressly or by necessary implication modified or abolished by its provisions. The rules of law prevalent in other countries, especially when they have been adopted in cognate Acts by the Indian Legislature and the earlier decisions of our Superior Courts, very often supply omissions in codified laws.

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Heritability

The right of a non occupancy raiyat is heritable, i.e. it descends in the same manner as other immovable property subject to any custom or local usage to the contrary. But there is a well recognised rule that if a raiyat dies without any heirs except the Crown the landlord takes possession. Tenancies at will are very rare in this country though they are not unknown, and the customary law or the "common law" of the country (if I may borrow the expression) makes all other classes of tenancies heritable. The Transfer of Property Act, though it does not apply to agricultural holdings¹ in Bengal recognises the heritability of the interest of tenants, when there is no contract or local usage to the contrary.² There is nothing in the Bengal Tenancy Act which takes away heritability from the status of a non occupancy raiyat.³

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Transferability

We have already seen that an occupancy raiyat can not, in the absence of custom or usage transfer his right *inter vivos* or bequeath it by a testamentary instrument.⁴ It is only reasonable to hold that the right of a non-occupancy raiyat is not also transferable and I believe the general custom of the country is also to that effect. But local usage may be proved to show that the right of a non occupancy raiyat is transferable. Section 178 sub section 3 cl (d) uses the word

Act IV of 1882, Sec. 117

Ibid, Sec. 108.

But see *Karim v. Sundar* 1 L. R. 24 Cal. 207—With the greatest deference to the learned judges who decided the case, it seems to me that the judgment is not in accordance with the spirit of the Bengal Tenancy Act.

Ante p. 299.

" raiyat" and not "occupancy raiyat," indicating thereby that the right to transfer may exist in all classes of raiyats.

A non occupancy raiyat is liable to be ejected on the ground "that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or that he has broken a condition consistent with the Bengal Tenancy Act and on breach of which he is, under the terms of the contract between himself and his landlord, liable to be ejected"¹ This is also the law as regards occupancy-raiyats.² The only material difference that seems to exist is that by section 178, sub-section 3, cl (e), an occupancy-raiyat cannot contract himself out of his right to sublet according to the provisions of Chapter VII of the Act, but such a contract of a non-occupancy raiyat with his landlord is not invalid It seems to me that a non-occupancy raiyat has the right to sublet, subject to the restrictions contained in section 85, but he may be restricted from doing so by the contract of lease

The right of a non-occupancy raiyat is not "protected" on a sale for arrears of revenue of an entire estate under Act XI of 1859 or Act VII (B C.) of 1868. It is an encumbrance within the meaning of these Acts and the purchaser may avoid it.³ Neither is it a "protected interest" on a sale under Regulation VIII of 1819⁴ or the Rent Acts of 1859 and 1869. But the Bengal Tenancy Act, of which it is a creation, calls "the right of a non-occupancy raiyat to hold for five years at a rent fixed under Chapter VI by a Court, or under Chapter X by a Revenue-officer"⁵ a "protected interest" not liable to be avoided on a sale for arrears of rent. The right is statutory and does not depend

¹ Act VIII of 1885, Sec 44, cl (b)

² Ante p 304 Act VIII of 1885, Sec 25

³ Act XI of 1859, Sec 37, Act VII (B C) of 1868, Sec 14.

⁴ Regulation VIII of 1819, Sec 11, cl 3

⁵ Act VIII of 1885, Sec 160, cl (e)

upoo a grant by the rent receiver, and like the right of occupancy it may be acquired by holding under a trespasser and the true owner cannot eject the raiyat on the ground that he has been induced into the land by a wrong doer.¹

† Surrender

As regards the right to *surrender*, the rule is the same as that applicable to occupancy raiyats. He can not of course surrender during the term specified in a duly written and registered contract of lease.²

† Non-payment of rent

A non occupancy raiyat can be ejected 'on the ground that he has failed to pay an arrear of rent.'³ The law applicable is nearly the same as that laid down in Act X of 1859⁴ and Act VIII (B C) of 1869⁵ as regards occupancy raiyats. Under section 65 of the Bengal Tenancy Act an occupancy raiyat is not liable to ejectment for arrears of rent but his holding is liable to sale in execution of a decree for such arrears.⁶ But under section 66 and section 44 cl (a) of the Act, the landlord is entitled to a decree for the ejectment of a non occupancy raiyat for an arrear of rent that remains unpaid at the end of any agricultural year, if the amount of the decree including costs and subsequent interest is not paid within fifteen days from the date of the decree or when the court is closed on the fifteenth day, on the day on which the court re opens.

† Expiration of term of lease.

The expiry of the term of a registered lease may be a ground for the ejectment of a non occupancy raiyat, provided he has been served with a proper notice to quit not less than six months before the expiration of the term⁷ and provided his occupation of the land began under the particular lease.⁸

Mohima v Hazari, I. L. R. 17 Cal. 45 ; *Binod v. Kalia* I. L. R. 20 Cal 708.

Ante p. 307 Act VIII of 1883, Sec. 178, Sub-Sec. 3, cl. (c).

Act VIII of 1883 Sec. 44, cl. (a)

Act X of 1859, Sec. 78.

Act VIII (B C) of 1869, Sec. 52.

Ante p 303

Act VIII of 1883, Sec. 45.

Ibid, Sec. 47

In any case the suit must be instituted within six months from the expiration of the term¹ If, however, the raiyat was on the land from before the execution of a registered lease, the expiration of the term mentioned therein does not entitle the landlord to re-enter the land, whether the right to re-enter is expressly reserved or not If the landlord delays in bringing a suit and allows six months to expire from the end of the term, there is an absolute bar to the institution of a suit for ejectment,

+ Thus you see, the grounds of ejectment of a non-occupancy raiyat are extremely limited, and unless the landlord is always wide awake and there is a scrambling for land, so that he may change the raiyat after the expiration of the term of a registered lease under which the tenant holds, non occupancy raiyats have always fair chances of acquiring the status of occupancy-raiyats.

Refusal to agree to pay a fair and equitable rent may also be a ground for the ejectment of a non-occupancy raiyat When he first enters into the land, he is bound to pay rent at the rate agreed upon between himself and his landlord² But if at the end of the term of the first lease, the landlord, instead of determining the right of the raiyat according to the provisions of the Act, chooses to retain him as a tenant and asks the court to compel the tenant to enter into an agreement to pay rent at a higher rate, the court ought not to enforce the payment of any rates but such as are just and equitable He is not entitled to the full market-rate or the highest rack-rent Whatever the initial rent might have been, the court has a right to interfere on a fresh settlement In *Bokronath Mundul v Binodh Ram Sein*,³ a Full Bench of the Calcutta High Court held—"A landlord cannot recover rent at an enhanced rate from a raiyat who has not a right of occupancy, unless he proves the existence

X Refusal to pay fair and equitable rent

Bokronath Mundul v Binodh Ram Sein

¹ A & VIII of 1885, Sec 45

² A & VIII of 1885, Sec 42, A & X of 1859, Sec 8 *Sheik v Roheem*,

³ 2 Hay 433, *Sree v Lalla*, Marsh 325, *Syed v Aghori*, 2 B L R S N 15

⁴ 10 W. R., F B, 33, sc, 1 B L R., F B, 25

and the reasonableness of the grounds stated in his notice served under section 13 of Act X of 1859. Section 13 is applicable not merely to raiyats having a right of occupancy, but to all under tenants and raiyats. Peacock, C J, observed in the same case — It was contended in argument that the landlord may enhance the rent of a raiyat not having a right of occupancy to any amount he pleases and may specify any grounds that he pleases, for such enhancement, and that he is not bound to prove that any of such grounds exist, and that it is for the raiyat to prove that no such ground exists. If such an argument were tenable a landlord might give notice that he intends to enhance to some exorbitant amount upon the ground that he is a grasping oppressive landlord having no regard for justice or fair dealing or for the interests of any one except himself. It might be difficult if not impossible in many cases for a raiyat to disprove the grounds alleged by showing that the landlord was not a person of that description. This shows that the grounds must be reasonable and such as to justify the enhancement claimed. The *onus* of proving the existence of the grounds alleged is upon the land-owner. It appears to me that the judges who referred this case came to a right conclusion that a landlord cannot enhance the rent unless he states the grounds on which he seeks to enhance and that if those grounds are disputed it will be for the court to determine whether they exist, and whether they are such as to justify the enhancement. The Bengal Tenancy Act has amplified the rule and has prescribed further rules for determining what is fair and equitable rent and the procedure which should be observed. I propose to deal with the question of the settlement of rent in the next lecture.

LECTURE XI.

RAIYATS

(RATE OF RENT).

In dealing with occupancy right in the last lecture, I omitted to deal with an important matter as to the rate of rent—its enhancement and abatement. The question of the rate of rent is one of vital importance.

The first problem is—how was money-rent originally fixed? Rent in India was never *competitive* it was *customary*. The origin of any custom is always difficult to trace, but in this particular instance we have some data to go upon. There can be no doubt that the essence of customary rent was the price of a definite share of the produce,—an average of the quantity of the produce and its average selling value. An average of ten years' produce was the basis of Raja Todar Mal's settlement. Similar bases were also adopted in later times, whenever the Mahomedan government attempted directly to enhance the rent of raiyats in any locality,—a *silla* or a *perganah*—whenever it desired to have a permanent increase in land-revenue and wished to avoid the indirect method—the levying of *abwabs*. Each given locality or a *perganah* had thus its average rates for the various kinds of lands, and every new settlement, whether of abandoned land or waste land brought under cultivation, was based upon the customary rates of assessment. There was another principle underlying the assessment of rent, which caused differences in rates amongst the different classes of raiyats. There were the village elders,

Customary
rent

It is based on
an average of
produce and
its value

Variation in
the different
classes of
raiya's.

the *Mandals*, there were the ordinary *khodkast* or resident hereditary cultivators, and there were the *pahs* or non resident cultivators. There was a fourth class too,—those who had not, until very recently much importance as cultivators — the lowest sub-castes amongst the *Sudras* themselves who generally worked as labourers but occasionally held land as *raiylats*, though more generally as *under raiylats*. Each of these different classes of *raiylats* paid at varying rates of rent the elders paying less than the other classes and the labouring *Sudras* paying at the highest rate. The *Sudra* labourers as *raiylats* seem to have occupied the least productive lands and paid as rent the entire value of the crop less the cost of labour and the value of the seed. These were the leading principles that underlay customary rent in India—principles which are and ought to be the bases of enhancement or abatement of rent at the present day. In India, more than in any other country every thing has a tendency to unchangeableness and when once the rates in any locality are fixed on these principles, they become *customary* or *perganah* rates. Rent of land is over the greater portion of the world controlled by custom and, even in England where land is held by tenants at competitive rent, custom is not entirely overlooked.¹

Ricardo and
Malthus.

Ricardo's theory of rent is well known. According to him the rent of any particular piece of land is the estimated difference between the amount which it produces and the amount of produce raised from the worst land in cultivation. The nett produce is that which remains after every expense connected with the farm has been paid and after an adequate remuneration has been given as the price of labour employed and the use of capital. A rise in the rate of profit or in the rate of wages unless accompanied by some counteracting circumstances, causes the rate of rent to decline. This

¹ J. D. Howell's Fragmentary Treatise on Political Economy

theory of rent may be true when there is free competition for land and when there is no interference by law or custom causing disturbance to free competition. Increase of population and consequent demand for land and the rise in the value of produce and decrease in the wages of labourers may increase the rate of rent in other countries, but in India custom controls the theories of Ricardo and Malthus and the political economists who have followed them.

According to J. S. Mill, the principle of competition J. S. Mill gives to the theories of rent, as enunciated by Ricardo and Malthus, a scientific character, but competition has never been the exclusive regulator in any country—the causes of aberration being various and indefinite. In fact, competition never exercised unlimited sway in any country, until a comparatively modern period. He says—"The farther we look back into history, the more we see all transactions and engagements under the influence of fixed custom. The reason is evident. Custom is the most powerful protector of the weak against the strong, or their sole protector where there are no laws, no government adequate to the purpose, though the law of the strongest decides. It is not the intention, or in general, the practice of the strongest to strain the law to the utmost; and every relaxation of it has a tendency to become a custom, and every custom to become a right. Rights, thus originating, and not competition in any shape, determine the share of the produce enjoyed by those who produce it. The relation, more specially between the landholder and the cultivator, and the payment made by the latter to the former, are in all states of society but the most modern, determined by the usage of the country. Never, until late times, has the condition of the occupancy of land been, as a general rule, an affair of competition. The occupier for the time has, very commonly, been considered to have a right to

retain his holding, whilst he fulfils the customary requirements, and has thus become in a certain sense a co-proprietor in the soil¹

Mill's theory
ac
In

The majority of the judges in the case of *Thakooranee Dossee v Bisheshur Mookerjee*² accepted Mill's view of rent in India and agreed in holding that whatever the theory of rent applicable to England might be, the customary or *perganah* rate should be the true basis of ascertainment of rent in India "The custom of the country and not the theory of English political economists should be applied to this country All that is not comprehended in the wages of labour and profit of the raiyat's stock is *not* the landlord's rent"

Analysis of
the idea of
customary
rent

An analysis of the idea of customary rent in India resolves it into the following elements —

- 1 Quantity of land✓
- 2 Productive power of land✓
- 3 The average value of the produce in or near the locality✓
- 4 The class to which the raiyat belongs✓

The rent of any piece of land is ordinarily fixed on a consideration of these elements and the tenant is bound to pay the same as fair and equitable Thus the contract rate and the customary rate should coincide

Causes of
variation
from custom-
ary rate.

The customary or *perganah* rate having originally been based on these elements variations due to accidental causes may entitle the rent receiver to demand rent at a higher rate or the rent payer to ask for an abatement. But according to another well established custom, variation could not be attempted with respect to any particular raiyat or any particular holding but could only be attempted with respect to a local area — an entire village or a *perganah* In particular instances, the rate of rent might for some cause or other have

¹ Principles of Political Economy Bk. II Ch. IV 2.
B. L. R. (F B) 202, etc. 3 W. R. (A & X) 29.

been lower than that at which rent was paid by the majority of raiyats, and in such cases the landlord might increase the rent to the ordinary customary rate of the locality. Such instances were, however, rare, and unless there was a wholesale enhancement, no raiyat could be compelled to pay at a higher rate.

When Act X of 1859 was passed, it was provided by section 17 of the Act¹—"No raiyat having a right of occupancy shall be liable to an enhancement of the rent previously paid by him except on some one of the following grounds, namely —

Act X of 1859,
Sec 17 and
Act VIII
(B C) of
1869, Sec 18

- (a) That the rate of rent paid by such raiyat is below the prevailing rate payable by the same class of raiyats for land of a similar description and with similar advantages in the places adjacent
- (b) That the value of the produce or the productive powers of the land have been increased otherwise than by the agency or at the expense of the raiyat
- (c) That the quantity of land held by the raiyat has been proved by measurement to be greater than the quantity for which rent has been previously paid by him"

The section did not expressly refer to customary or pergunah rates, neither did the Act lay down any especial procedure for enhancement of rent of all the raiyats in any local area. The Pottah Regulations in the Bengal Code contemplated equalization and fair and equitable rent of raiyats in a local area, but the provisions made were imperfect, and no effectual steps were ever taken to properly enforce them. The first ground of enhancement,—that the rate at which rent is paid by the raiyat is below that prevailing in adjacent places,—relates to the pergunah or customary rate. It assumes that the

What is fair
and equitable
rent

¹ See Act VIII (B C) of 1869, Sec 18

Rate of rent paid by the majority of raiyats in any locality is fair and equitable and that if there are no special causes affecting any particular raiyat which entitle him to pay at a lower rate his rate of rent should be equalised to that of his neighbours. The Act does not provide for reduction of rent if the raiyat has been paying at a higher rate than his neighbours the assumption apparently being that the rate of rent previously paid by him is for some especial cause fair and equitable. Section 30¹ clause (a) of the Bengal Tenancy Act covers almost the same ground as the first clause of section 17 of Act X of 1859. Section 38 of the Bengal Tenancy Act while laying down rules about reduction of rent does not contemplate reduction on the ground that the rate at which rent is paid by a particular raiyat is higher than the prevailing rate.

Prevailing
rate.

The prevailing rate of rent paid for lands of a similar description with similar advantages in the places adjacent is, in the present state of things extremely difficult to determine. Various causes, the principal of which are the landlord's caprice or tyranny and the tenant's weakness have in many localities nearly destroyed what one would call the customary rate. The raiyats generally pay at varying rates, varying with the power of resistance which each of them possesses. In many instances colourable kabuliats at rates higher than the really prevailing rates come forward in abundance in support of the landlord's cause and courts of law feel the greatest difficulty in finding out the truth even if there be a prevailing rate. The determination of the question as to what is the prevailing rate has necessarily induced rulings not quite consistent with each other. In one of the leading cases¹ on the subject, the late Justice Dwarkanath Mitter observed— 'Prevailing rate means the rate paid by the majority of the raiyats in the

Shadboo Singh v. Ramanoo-graha Lall

¹ Shadboo Singh v. Ramanoo-graha Lall, 9 WR 83.

neighbourhood" It must be paid generally and not by a number of witnesses only In *Priag Lall v. Brockman*,¹ the evidence of three *patwaries*, who put in their *jummabandies* showing the rates payable by almost all the raiyats, was held sufficient to prove the prevailing rate The duty of a judge, when dealing with a case based on this ground of enhancement, is not to determine the fair or equitable rate, nor to strike an average and thereby determine the prevailing rate, but to find out strictly the rate which has adjusted itself and is actually paid as *nirik* or rate by a very large majority of raiyats² But though the customary and pergunah rate is generally the prevailing rate, it is not always so. The established rate might have been changed with respect to many raiyats, and the customary rate might have ceased to be the prevailing rate at the date of the institution of a suit for enhancement³

The Bengal Tenancy Act has provided⁴ that, in determining the prevailing rate, the rates generally paid for not less than three years before the institution of the suit should be taken into consideration, and for ascertaining the rates satisfactorily, such revenue-officer as the Local Government may authorize on that behalf may be appointed a commissioner under section 392 of the Civil Procedure Code

Act VIII of
1885, Sec 31

Under Act X of 1859, the prevailing rate for the purposes of enhancement must be payable by the same class of raiyats There was a conflict of cases as to the meaning of the expression—"same class" It was

Same class
of raiyats

¹ 13 W R 346

² *Sumeera v Gopal*, 1 W R 58, *Pela v Nund*, 6 W R. (Act X)

³ 45 *Jaun v Jan*, 9 W R 149, *Surahutoonissa v Gyanee*, 11 W R 142, *Gunga v Sharoda* 12 W R 30, *Priag v J G Brockman*, 13 W R 346, *Rowshun v Chundur*, 16 W R 177, *Audh v Dost*, 22 W R 185; *Tikaram v Sandes*, 22 W R 335, *Akul v. Ameen*, 5 C L. R 41, *Sreeman v Lukshmoni*, Marsh 379 *Per Contra Shaikh Dena v Mohinee*, 21 W R 157

⁴ *Kallee v Ruttun*, 11 W R 571.

⁵ Act VIII of 1885, Sec 31

held that the wards referred exclusively to occupancy raiyats but there might be separate classes in the general body of occupancy raiyats¹. Amongst the occupancy raiyats in the same village, there are *jayt* raiyats or *mandals* who generally pay at a lower rate and then there are the *khodkast* and *pahi* raiyats. The Bengal Tenancy Act has attempted to clear the difficulty by laying down that 'whenever it is found that by local custom any description of raiyats holds at a favourable rate of rent the rate shall be determined in accordance with such custom'. But ordinarily the rate paid by occupancy raiyats without reference to caste or class should be taken into consideration.

Places adjacent.
to t.

Places adjacent² include in its range a very wide circle and not merely a village or a *perganah*.³ The *perganah* rate of the Mahomedan times has however long ceased to exist and each village under a *zemindar* or a subordinate tenure holder has its customary or local rate. Lands lying in a different village or in a different *perganah* may yield better harvest than lands in the village in which enhancement is claimed by the landlord. Raiyats in one village under one landlord may hold lands at more favourable rates than raiyats holding lands in a neighbouring village under another landlord. To apply the prevailing rate in one village to another would in many instances be unfair and inequitable. The Bengal Tenancy Act has laid down that in determining the prevailing rate only the village in which the land lies should be taken into consideration⁴.

¹ Ram Coomar v Bhuyrub 6 W R. (A.C. X) 33; Purmanand v Puddomosee, Merib 379, ac 9 W R. 349; Gourea v Ram 12 W R. 102; Woomanath v Ashumburee, 12 W R. 475; Mothoora v Nilmoose 13 W R. 297.

Act VIII of 1885, Sec. 31.

Kallee v Rutton 12 W R. 571; Mr J. Tweedie v Poorna, 12 W R. 138; Shaikh Dana v Baboo Mubaree, 21 W R. 157.

Act VIII of 1885, Sec. 30, cl. (a).

"Description of land" includes the productive power as well as the nature of the crop capable of being produced on it. In most of the Bengal districts, lands in agricultural holdings are divided into various classes, of which the principal are the following —

Description
of land

1 Sali or jal or dhanhar, i e.,—lands producing aman (winter) paddy. These lands are generally low, and are divided into four sub-classes according to their productive powers, *viz*, awal (first), doem (second), syem (third) and chaharam (fourth)

Sali, jal or dhanhar

(2) Suna or bhut producing two crops—the autumn paddy or jute or crops known as bhadoi, and the winter crops—potato, seeds, wheat, barley and others known as rabi. Sugar-cane is also produced on such lands. These also are divided into four classes as above

Suna or bhut

(3) *Bastu* or homestead lands and *udbastu* or land near the homestead used by the raiyat for his cattle

Bastu and udbastu

(4) Land covered by water

Covered by
water

These last two kinds of land, when they appertain to a tenant's agricultural holding must come within the purview of section 17 of Act X of 1859 and section 30 of the Bengal Tenancy Act

(5) Garden land being horticultural also comes within the purview of the Rent Acts

Horticultural
lands

(6) Pasture (*ghaskar*) lands and *kharkar* lands which yield thatching grasses

Ghaskar and kharkar

The value of land producing grains depends, in any village, upon proximity to tanks or water-courses which afford means of irrigation. In this country, distance from the nearest market or place of sale is seldom taken into consideration, unless it leads to a material difference in the market value of the produce. Villages are generally not very large, and the transit of goods costs almost the same amount, the distances of the fields from one another and the market being inappreciable. The rent of lands no doubt varies considerably according to their distances from

Similar ad-
vantage

a town, or a railway station or a trade-centre or a navigable river, but such variations affect only the lands of one village as compared with those of another at a distance. The advantages of one piece of land over another in the same village if it is not grain producing, consist not only in its proximity to reservoirs of water and streams but also in easy access from the homes of the village people who generally live close to one another in clusters of huts. There may also be an advantage of one piece of land over another by its distance from homestead lands and fields appertaining to other villages.

Value of produce and productive power of land

The second ground of enhancement is the increase in the *value of the produce* or the *productive power of land*. Clauses (b), (c) and (d) of section 30 of the Bengal Tenancy Act cover almost the same ground as clause (b) of section 17 of Act X of 1859. This ground involves quantities not easy to determine and requires solution of problems of great difficulty.

Rise in average prices.

The vagueness of the expression 'the value of the produce' in section 17 of Act X of 1859 has been attempted to be avoided in the Bengal Tenancy Act by the words rise in the average local prices of staple food crops and sections 32, 33 and 34 of the latter Act have laid down certain rules with reference to this ground of enhancement of rent but still the difficulty in ascertaining the exact rise in the prices of staple food crops is as great as ever.

Rule of proportion.

Increased demand of staple food crops from an increase of the non agricultural population of a country and of its commercial industry leading to larger exports into foreign countries necessarily brings about a general rise in the value of produce if there is no proportional increase in the area of agricultural lands. Decrease in the value of money as a medium of exchange also leads to a general rise in the value of food crops. The landlords begin to demand rent at enhanced rates, and the rise in the value of grains naturally

accommodates itself to the landlords' demand. The raiyats gradually pay at a fair rate of rent, but if as a class they decline to do so, it becomes necessary to determine, for the purposes of enhancement, the average rise in local prices of staple food crops and to find out what the proportionate increase in the rate of rent should be. In *Thakoorañee Dossee v Bisheshur Mookerjee*¹ the majority of the Judges held—"In all cases in which an adjustment of rent is requisite in consequence of a rise in the value of the produce caused simply by a rise of price, the method of proportion should be adopted—the former rent should bear to the enhanced rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value, bears to its present value." If the landlord was originally entitled only to a share of the produce, and the money-rent paid in modern days is roughly an equivalent of the money-value of that share at the time when rent in kind was commuted into rent in specie, this rule of proportion may work out the fair and equitable rent which an occupancy-raiyat ought to pay. Increase in the value of labour and increase in the cost of living of the raiyat and his family consequent upon an increase in the price of grains and the other necessities of life are disturbing elements, but are not sufficiently important to vary such a rule of proportion unless the increase is abnormally high. The increase, as a ground of enhancement of rent, must, however, be in the price of staple food crops and not of particular crops grown by raiyats in recent years at considerable cost in manuring and hired labour. Jute, indigo, tobacco, opium and ganja are particular crops which ought not to be taken into consideration.²

But after all, the rule of proportion is not very easy of application to actual facts. The terms necessary

Not easy of application

¹ B L R, Sup Vol, 202, sc, 3 W R (Aft X) 29

² Bhagruth v Mohasoop, 6 W. R (Aft X) 34.

to work out a proportion are difficult to find out. The value of staple food crops at the time of the previous settlement of rent is in most cases impossible to find out.¹ Price lists may now be of use but they were not generally prepared in former days. The causes of aberration are also many, and the very simplicity of the rule of proportion makes it inapplicable to a complex state of facts.

Rule of proportion not applicable where pergunah rate is equitable.

The rule of proportion laid down in *Thakoorani Dosse's* case is inapplicable where in particular instances fair and equitable rent may be determined by the prevailing pergunah rate.* It would seem from the provisions of the Bengal Tenancy Act as to enhancement and settlement of rent that the rule of proportion is applicable only when enhancement is sought for in any local area involving the holdings of a large number of tenants. Re-adjustment of rent ought only to be allowed when a change of customary rent is necessary on account of the altered state of things in a large area. Macpherson J. in his judgment in the Full Bench case above referred to, observed: "In my opinion the rule of proportion—as the old value of produce is to the old rent, so is the present value of produce to the rent which ought now to be paid—is the rule which should be adopted in the absence of any recently adjusted pergunah or customary rates. In so ascertaining the rate, we shall be ascertaining it on a principle similar to that on which the old pergunah or customary rates were fixed. We shall be doing what was deemed fair and equitable in the case of raiyats having a right of occupancy prior to Act X. and what is not less fair and equitable in the case of raiyats having a right of occupancy under that Act. Let the zemindar seeking to enhance the rent go back to any year he chooses, and let him prove that

the proportion was then more favourable to him than it has subsequently become. Either party should be at liberty, in each case, to prove any special circumstances tending to show that the application of the rule of proportion to that particular case would work injustice."

The increase in the price of staple food-crops must be in its natural and usual course in ordinary years. In *Bhagruth Doss and others v Mohasoop Roy and another*,¹ the High Court observed that accidental or exceptional high prices in any particular year or even successively for two or three years ought not to be taken as a measure for adjustment of rent. Various causes might affect the value of the produce for a year or two, but that would be no ground for enhancement. The Bengal Tenancy Act requires the calculation of average prices during a decennial period.² The proportion is to be worked out with reference to average prices during two decennial periods, the one immediately preceding the institution of the suit and the other any decennial period as may appear equitable and practicable to be taken for comparison.³ In order to avoid the hardship that may arise from an average of high prices in the later period, the Act has also provided that the average prices during the later period should be reduced by one third of their excess over the average prices during the earlier period.⁴ To make enhancement on this ground practicable, it has also given the court discretion to substitute any shorter periods instead of decennial periods.⁵

Average of prices in decennial periods.

Reduction of rent may be had on the ground that there has been a fall in prices not due to any temporary cause.⁶ The same rule of proportion, as in a case of enhancement of rent, has to be worked out. The court

Reduction of rent on fall in prices

¹ 6 W R (Aft X) 34

² Aft VIII of 1885, Sec 32, cl (a)

³ *Ibid*, Sec 32, cl (a)

⁴ Aft VIII of 1885, Sec 32, cl (b)

⁵ Aft VIII of 1885, Sec 32, cl (c)

⁶ Aft X of 1859, Sec 18, Aft VIII of 1885, Sec 38, Sub Sec 1, cl (b)

may, in any case, direct such reduction of rent as it thinks fair and equitable. But suits for abatement of rent are very rare, as a steady rise in prices has been the normal state of things under the British rule in India.

Deduction of
one-third.

The rule of proportion does not apply, where the increase or decrease in the price of staple food crops is accompanied by either a decrease or an increase in the productive power of land or in the cost of cultivation. Land is liable to deterioration by crops being raised successively for many years. The deterioration can only be checked by a judicious system of manuring which as a matter of fact, is little understood in this country. Manuring implies an increase in the cost of cultivation. Rise in the price of staple food crops and increase in the demand of labourers lead to a rise in the price of labour, and when hired labour is necessary for the purposes of cultivation an additional cause of aberration disturbs the operation of the rule of proportion. The rule in such a case requires to be modified and as there is a steady rise in the price of labour a deduction of something like one third as is contemplated by the Bengal Tenancy Act, is necessary to be made—a deduction which prevents also any mischief that may arise from exceptionally high prices in the later period.¹ In *Showdaminee Dasse v Shookool Mahomed*² Trevor J. thus stated the terms of the proportion—The average value of the produce before the decrease in the productive powers of the land, will be to the average value of the present decreased produce, *minus* the increased cost of production, as the rent previously paid will be to that which the land ought now to pay.

Increase in
the produc-
tive power of
land.

Increase in the productive power of land, otherwise than through the agency or at the expense of the raiyat can take place only on account of an improvement of

¹ Ante p. 361

² W. R. 94.

fectured by or at the expense of the landlord or by fluvial action¹ Land has a tendency to deteriorate from want of conservation of plant-food, but improved means of irrigation, embankments preventing inundations or flow of salt water, and improved methods of drainage, may and actually do increase the productive power of land Silt deposits in the deltaic provinces are frequent, and a piece of sandy land this year may, by the action of a river, become very fine arable land in the following year The drainage schemes have improved considerable areas in Bengal The zemindar who has to pay a large portion of the cost of improvement may very well demand increased rent The Bengal Drainage Act expressly empowers him to do so²

Instances of improvements made by raiyats themselves are not uncommon in this country, and in every suit for enhancement of rent on the ground of an increase in the productive power of the land held by the raiyat, the burden is on the landlord to show that it is not due to the agency of the raiyat³ Under the Bengal Tenancy Act, the burden is decidedly on the landlord If the raiyat converts at his own cost and labour arable land into a garden, which yields a larger income, or if he improves ordinary arable land by manuring, thereby making it yield crops like tobacco or potato, the landlord is entitled only to the rent of the land as it existed before the improvement⁴ When a raiyat brings waste land into cultivation, he is liable, after the *russaddi* period is over, to pay at the full *perganah* rate for the cultivated land But if the land which he originally obtained required special cost to make it culturable, and the raiyat had to spend more than ordinary labour and

Burden of
proof

¹ Act X of 1859, Sec 17; Act VIII of 1885, Secs 30 and 34

² Act VI (B C) of 1880, Secs 42 and 43

³ *Poolin v Watson*, 9 W R 190

⁴ *Chowdhry v Gour*, 2 W R (Act X) 40, *Golam Ali v Gopal Lal*, 9 W R 65

capital to make it good arable land, the landlord is not entitled to any benefit from the improvement. If the raiyat has impressed upon the land a character it would not naturally have the landlord is not entitled to ask for enhancement. Where a raiyat has dug a tank, planted an orchard at his cost or erected a distillery, it is the raiyat's agency and not the landlord's that has improved the land.¹

Orchards

But in *Obhoy Chunder Sirdar v Radhabullabh Sen*,² Garth C. J. observed— It is, in point of fact untrue that the increased productiveness of an orchard by reason of the growth of fruit trees, is due to the agency of the person who planted them. After the first expense of preparing the land, and planting and nurturing the young trees has been incurred the increase in the productiveness of an orchard depends probably far less upon the labour and outlay of the tenant than land used for the ordinary purposes of agriculture. The trees may require a certain amount of care and attention for time to time but their growth and productiveness depend far more upon the quality of the soil, and the fertilizing influence of the seasons than upon the labour of man. It is quite right of course that in settling the rent of land which is let for the purposes of an orchard a due allowance should be made to the tenant to cover the cost of his original outlay in the way both of labour and capital but after such allowance has been made, there is no reason why the rent of the lands used for orchards should not be liable to enhancement or abatement from time to time, in the same way as lands used for other kinds of culture. With the greatest deference to the opinion of the learned Chief Justice, it seems to me that it is questionable in any case in which arable land is taken by the

¹ *Sreerum v Lakhun*, 2 Hay 427; *Showdaminee v Haran* 6 W. R. (A.C. X) 103; *Brojo v. Stewart*, 8 B. L. R. App. 51 & 16 W. R. 216
² C. L. R. 549.

tenant at the usual rate of rent, and improvement is afterwards effected by the tenant planting fruit trees

The Bengal Tenancy Act has a rigid rule that only improvements effected by or at the expense of the landlord may be the basis of enhancement. Section 33 of the Act requires the registration of an improvement under the provisions of the Act as a necessary preliminary to a suit for enhancement on this ground, and sections 80 and 81 lay down rules for the registration of improvements

Improvements made by landlord.

Improvement by fluvial action must not merely be temporary or casual¹. It must last or is likely to last for a considerable time. An enhancement of rent on this ground should always be fair and equitable, but not so as to give the landlord more than one half of the value of the net increase in the produce of the land².

Improvement by fluvial action

Reduction of rent may be claimed on the ground that the productive power of the land held by the raiyat has decreased for any cause beyond his control. Permanent deterioration by deposit of sand or such other specific causes, sudden or gradual, entitles the tenant to ask for abatement. Principles of natural justice and equity require that, if during the period of the raiyat's occupation permanent deterioration takes place of any portion of the land held by him by the act of God, and not through the fault of the raiyat, he should not be made to pay the same rent as before³. Under the Acts of 1859 and 1869, the tenant might either sue for abatement or claim abatement as a set off in a suit for rent brought by the landlord⁴. But in either case

Reduction of rent on deterioration of land

¹ Act VIII of 1885, Sec 34, cl (a) *Kristo v Huree*, 7 W R 235

² Act VIII of 1885, Sec 34, cl (b)

³ Act X of 1859, Sec 18, Act VIII of 1885, Sec 38; *Sheik Enayutollah v Sheik Elahee*, W R, 1864, (Act X) 42, *Munsoor Ali v Harvey*, 11 W R 291

⁴ *Barry v Abdool*, W R, 1864, (Act X) 64, *Mohesh v Gunga*, 2 Hay 495, *Afsurooddeen v Sarooshee*, 2 Hay 664; *Deen v Thukroo*, 6 W. R. (Act X) 24, *Gour v Bonomalee*, 22 W R, 117.

the burden of proof is upon the tenant.¹ The Bengal Tenancy Act contemplates abatement by a suit and the court may direct in such a suit such a reduction of rent as it thinks fair and equitable

Alteration of
rent on alter-
ation of area.

Alteration of rent on alteration of area is an important incident of tenancy in this country. It is not confined to occupancy holdings only. The rent of a permanent tenure or a permanent agricultural holding may be altered on alteration of the quantity of land in the tenure or holding.² We have seen³ that the law, as it stood before the Bengal Tenancy Act came into force enabled every tenant to claim an abatement of rent for diminution of the area of the land held by him, caused by circumstances beyond his control, unless there is a clear stipulation to the contrary. The question of the increase of rent in respect of any additional land gained by fluvial action in a permanent tenure was however more difficult to answer. If abatement was allowed at any time on the ground of a diminution of area by diluvion enhancement must be allowed on accretion or reformation. But if abatement was never claimed and allowed the landlord was entitled to assess only accretions if he could show that he was entitled to do so by established usage or agreement.⁴ In *Juggut Chunder Dutt and others v Panioty and others*, which came before the High Court three times in appeal and once on review, it was held that the zemindar was precluded from assessing accretions

Increase of
area by fluvial
action.

Act VIII of 1885 Sec. 38, *Savi v Obhoy* 2 W. R. (Aft X) 28.

Afsurooddeen v Sherooshee Marsh 558; *Uma v Tarini* 1 L. R. 9 Cal. 571. See also *Horo v Joy Kissen*, 1 W. R. 399; *Prosunomoyee v Soondur* 2 W. R. (Aft X) 30; *Komolakan v Pogose*, 2 W. R. (Aft X) 65; *Shokpor v Umola*, 8 W. R. 504. *Watson v Nistarin* 1 L. R. 10 Cal. 544. But see *Ram v Poolie* 2 C. L. R. 5.

Ante pp 184, 295.

Ramnidhee v Parbutty 1 L. R. 5 Cal. 823; *Brojendra v Woonpandra*, 1 L. R. 8 Cal. 706; *Golam v Kall*, 8 C. L. R. 517; *Harry v Gopee* 10 C. L. R. 559.

though there were considerable differences in the opinions of the judges.¹

The law as regards raiyat holdings was, however, well settled. Section 17 of Act X of 1859² provided for assessment of additional rent for additional land found by measurement in the raiyat's holding, and section 18 provided for abatement of rent, if the quantity of land held by the raiyat could be proved by measurement to be less than the quantity for which rent was payable by the raiyat. The Act made no provision for any class of tenants excepting raiyats with rights of occupancy. I need hardly add that either as regards enhancement or abatement of rent on alteration of area, the rate per bigha must be taken to be fixed.

Raiyat holdings

The Bengal Tenancy Act applies the provisions of sections 17 and 18 of Act X of 1859 to all classes of tenants.³ If the increase in area is due to the action of a river, and if there was no previous diluvion reducing the area of the tenant's original holding, or if abatement was allowed on diluvion, the tenant is bound to pay additional rent for excess land. So also abatement is allowed on diluvion.

Act VIII of 1885, Sec 52

The present area of a tenure or holding may easily be determined by measurement, but the difficulty in finding out the original quantity of land and the rate per unit of measurement is, however, great. Dismissal of suits for enhancement or abatement of rent on account of increase or decrease in area is mainly due to this difficulty. The length of the measure used at the time of the origin of the tenancy, *i. e.*, the standard pole of measurement, is also very often disputed and is not easy to find out.⁴

Difficulty of finding out area at the origin of tenancy

Standard pole

¹ 6 W. R. (Act X) 48, 8 W. R. 427, and 9 W. R. 379

² Act VIII (B. C.) of 1869, Sec 18

³ Act VIII of 1885, Sec 52, cls (a) and (b)

⁴ Gouri v. Reily, 1 L. R. 20 Cal 579

How may
area increase.

As we have said before,¹ increase in area may take place,—(a) by the tenant's encroaching on the adjacent land of his landlord and (b) on the adjacent land of a third person and used by the tenant as a part of his holding and (c) by accretion. Reformation *in situ* only makes up the land lost and may, at present, be left out of consideration.²

Alluvion

On increase by alluvion 'the tenant has the right to continue in occupation of the land and is only liable to pay additional rent, though at one time the law was supposed to be that no raiyat was entitled to possession of land added to his holding by accretion'.³ Under the Bengal Tenancy Act, no doubt can arise, and it seems to me that section 17 of Act X also contemplated additional rent for land gained by accretion.

How may
area decrease.

Decrease in area may take place—(a) on account of encroachment by a neighbouring holder (b) encroachment by the landlord himself (c) by diluvion and (d) by acquisition of land by Government for public purposes.

Encroach-
ment by a
third person

Encroachment by a neighbouring holder ought not to be a ground of abatement of rent, if the encroachment be due to an act of trespass. The tenant can resist such encroachment, and if he does not do so, he is guilty of laches and ought not to be allowed to make the landlord suffer for his negligence. But if the encroachment be under a title paramount, the rent ought to abate proportionately.⁴

* Encroach-
ment by land-
lord.

Encroachment by the landlord himself on any part of a raiyat's holding causes a suspension of the entire rent.⁵ But as a matter of fact the raiyat seldom claims suspension of rent; he is contented with abatement. He thinks

¹ Ante pp. 292-295.

For the law as to landlord's right on encroachment by tenant, see pp. 221-223.

³ Finlay v. Gopee, 24 W. R. 404.

⁴ Ante pp. 218-295-d.

Ante pp. 218-2.

himself fortunate, if he is allowed to hold the rest of the land in his original holding submitting to the encroachment by the landlord and can get an abatement *pro tanto* I have already said that the rule of English law as to suspension of the entire rent can not be applied in this country except under very peculiar circumstances

In cases of diluvion, section 18 of Act X of 1859, Diluvion section 19 of Act VIII (B C) of 1869 and section 52 of Act VIII of 1885 leave no room for doubt as to the right of an occupancy-*rai*yat Section 178 of the Act of 1885 makes any contract taking away the right of a *rai*yat to apply for a reduction of rent under section 52 of the Act¹ invalid, if it is entered into after the passing of the Act This provision of the Act is applicable to all classes of *rai*yats, and not merely to *rai*yats with rights of occupancy An express agreement not to claim abatement entered into before the passing of the Act, is good Section 179 of the Act declares the validity of such a contract between a proprietor or a holder of a permanent tenure in a permanently settled area and a holder of a permanent *mukurrari* lease

Acquisition of land for public purposes necessarily causes abatement of rent in respect of the land acquired The *rai*yat may, however, at the time of the acquisition, take such a portion of the compensation as may disentitle him to claim abatement Acquisition of land for public purposes

The standard pole of measurement generally varies in the different localities of the Bengal provinces Standard pole Section 41 of Act VIII (B C) of 1869, which repealed section 11 of Bengal Act VI of 1862, provided that all measurement should be made according to the standard pole of the *perganah* in which the land was situated The Collector was competent to determine the standard² In one case

¹ Act VIII of 1885, Sec. 178, Sub-Sec 3, cl (f)

² *Srimati Manmohini v Premchand*, 6 B L R, F B, 1, sc, 14 W R, F B, 5.

it was observed that it was exclusively within the province of the Collector as the depository of the standard pole of each pergunah, to declare what the measure of the pole used was in each pergunah in his district¹. There existed considerable difference of opinion as to the value of any measurement paper if the measurement was not made according to the standard pole. The correctness of the measurement itself could be called in question². An appeal lay as regards the standard pole³. The Bengal Tenancy Act⁴ however requires every measurement to be made by the acre unless the court or revenue officer ordering it specially directs that it shall be made by any other specified standard⁵. But the rights of the parties are regulated by the conversion of the acre into the local measure. The Local Government is also empowered to make rules declaring the standard or standards of measurement locally in use in any local area and every declaration so made shall be presumed to be correct until the contrary is shewn⁶. At the present day the landlord generally claims the standard to be eighteen inches a *kath* or *cuhi* while the tenant claims 20 inches or more. In some localities the standard used is the *slahigaj*⁷.

Bengal Act
VI of 1862.

Act VI (B C) of 1862⁸ gave the landlord the right of making at any time a general survey or measurement of the lands comprised in his estate or tenure or any part thereof unless restrained from doing so by any express engagement with the occupants of the lands. The

¹ Tarucknath v. Meydeo 5 W. R. (A. C. X) 17.

Roma Nath v. Dhokkha, 11 W. R. 310; Brojo v. Kassim, 11 W. R. 562. *Per contra* Rakhal v. Tunoo, 7 W. R. 239.

Bhuggobutty v. Tameeruddoon 1 W. R. 224; Nund v. Tara, 2 W. R. (A. C. X) 13; Surbanund v. Ruchla, 4 W. R. (A. C. X) 32.

A. C. VIII of 1885, Sec. 92.

Ibid., Sec. 92 Sub-Sec. 1.

Ibid., Sec. 92, Sub-Sec. 3.

Goj ilahi = 33 inches (Land-measure of N. W. Provinces.)

⁸ Act VI (B. C.) of 1862, Sec. 9.

power could be exercised with respect to any land in the occupation of an under-tenant or raiyat. If any opposition was made, the landlord could seek the assistance of the Collector, who might order the tenant to attend and point out the boundaries of the land held by him. Sections 25 and 37 of Bengal Act VIII of 1869 and sections 90 and 91 of the Bengal Tenancy Act have conferred the same power on landlords. But under the latter Act the right cannot be exercised more than once in ten years except under the circumstances specified in section 90. This right to measure is a necessary incident of proprietary right, as it enables the landlord to ascertain the boundaries and the area of any tenure or holding and whether there has been any encroachment or increase by alluvion and consequent alteration in area, and then if necessary to demand an increase of rent on the ground of an increase in area.

The right to measure, like the right to enhance rent can be exercised only by a proprietor in possession and actual receipt of rent. A proprietor who is not in possession is not entitled to measure any land within the ambit of his estate.¹ If any question arises as to the right to measure, the dispute being raised on the ground of possession by a third person as proprietor or tenure-holder, the Court has only to look to actual possession by receipt of rent. Under Act VIII of 1885 (Sec. 60) a proprietor whose name is registered under Act VII (B.C.) of 1876 is presumed to be in possession, having the right to receive rent, and so he also is entitled to measure. His right is not affected by the lands having been let out on permanent leases.²

* Only proprietors in possession can measure

¹ *Kalee v Ramguttee*, 6 W R (Aft X) 10, *Pureejan v Bykunt*, 7 W R 96, *Krishto v Ram*, 9 W R 331. *Per contra* *Nundun v Smith*, 7 W R 188, *Wise v Ram*, 7 W R 415, *Doorga v Mahomed*, 14 W R 121, 399.

² *Raj v Kishen*, 4 W R (Aft X) 16, *Dwarka v Bhowanee*, 8 W. R. 11, *Run Bahadoor v Muloo*, 8 W R 149, *Tweedie v Ramnarain*, 9 W. R. 151.

* A part proprietor can not apply for measurement.

A part proprietor of an estate or tenure cannot apply for measurement.¹ Section 188 of the Bengal Tenancy Act prevents any one or more of the co sharers unless all of them join from asking the assistance of a Court to enable him or them to measure the lands. Notice of an intended measurement must also be given by all the joint proprietors. A part proprietor of an estate however was held to be competent to apply for measurement under section 38 of Act VIII (B.C.) of 1869 (Bengal Act VI of 1862, Sec. 10), if he made his co proprietors parties to the proceeding.² It seems to me however, to be doubtful whether the legislature ever intended to give a co-proprietor such a power.

* Lakhiraj lands.

Under the Acts of 1862 and 1869 a question was raised as to the right of a proprietor or tenure holder to measure *lakhiraj* lands. The word *lakhiraj* means, in ordinary parlance, lands revenue free as well as rent free. The zemindar's right to have a measurement made it was held extended only to lands actually rent paying and not to rent free or revenue free lands.³ The Bengal Tenancy Act makes the holders of *rent free* lands claiming under titles created since the Permanent Settlement tenants within the meaning of section 3 subsection 3 and it is only reasonable that a landlord should have the right to enter on and measure all lands comprised in his estate or tenure other than lands exempt from payment of *revenue*. Holders of revenue free lands are proprietors and such lands though lying within the ambit of a rev

† Moolook v. Modhoo 16 W. R. 126; Shoorender v. Bhuggob 18 W. R. 332; Santeeram v. Bykunt, 19 W. R. 280; Pearaw Raj 20 W. R. 385; Ishan v. Buzaruddin 5 C. L. R. 132. *Per contra* Abdool v. Lall Chaudhary 10 C. L. R. 36 *sc.* 13 C. L. R. 333.

Abdool v. Lall 10 C. L. R. 36.

* Ru g v. Sreedh 11 W. R. 293, *sc.* 3 B. L. R. App. 27; Golam v. Brinkin 11 W. R. 445; Khugendro v. Kantce, 14 W. R. 368.

enue-paying estate, can not be measured by the holder of the latter ¹

If a tenant, on being called upon to attend and point out his land and the boundaries thereof, refused or neglected to do so, it was not competent for him to contest the correctness of the measurement made in his absence, provided the Court acting under section 9 of Act VI (B C) of 1862 or section 37 of Act VIII (B C) of 1869, had local as well as pecuniary jurisdiction, and the person making the application had the right to do so ² If the person applying to the Court for measurement was only a part-owner or was not in possession, a measurement made at his instance in the absence of the tenant would not be binding So also, if the tenant had no notice of the measurement, he would not be bound by it ³ The Bengal Tenancy Act, however, lays down that if the tenant refuses or neglects to attend, in accordance with an order duly made and served under section 91, sub-section 1, the measurement made in his absence shall be presumed to be correct, until the contrary is shewn ⁴

gm
Value of
measure-
ment-papers

Regulation V of 1812 made the issue of a notice a necessary preliminary to the institution of a suit for an increase of rent This provision was re-enacted in section 13 of Act X of 1859 and section 14 of Act VIII (B C) of 1869 A large percentage of enhancement-suits failed for defects in the form of notices or their non-service In most instances, the suits were dismissed, in others decrees were made declaring the right of the landlords to enhance, the prayers for decrees at enhanced rates being dismissed A notice of enhancement was required to be served in districts or parts of districts, where the Fush year prevailed, in or before the

gm
Notice of en-
hancement

¹ Prosunomoyee v Chundernath, 10 W R 361, sc. 2 B L R, S. N, 5

² Jadub v Etwar, Marsh 498

³ See Alimuddi v Kali Krishna, 1 L R 10 Cal. 895

Act VIII of 1885, Sec 91, Sub-Sec 2

month of Jeyt, and in districts or parts of districts where the Bengal year prevailed, 10 or before the month of Pous. Under the Bengal Tenancy Act, the landlord is empowered to institute a suit for enhancement, without the previous service of any notice and the decree in such a suit should contain a direction as to time when it is to take effect. Section 154 of the Bengal Tenancy Act provides that a decree for enhancement of rent if passed in a suit instituted in the first eight months of an agricultural year, shall ordinarily take effect on the commencement of the next agricultural year and in a suit instituted in the last four months of an agricultural year on the commencement of the agricultural year next but one following. But the Court may for special reasons fix a later date for the operation of any decree for enhanced rent.

○
Gradual en-
hancement.

Under the Bengal Tenancy Act enhancement of rent may be directed to be gradual for any number of years not exceeding five¹. No suit for enhancement on the ground that the rate of rent paid is below the prevailing rate or on the ground of a rise in prices is maintainable if within the fifteen years next preceding its institution the rent has been enhanced by contract made after the 2nd March 1883 or commuted under section 40 or if a decree enhancing the rent has been passed on either of the grounds aforesaid or a suit for enhancement dismissed on its merits².

○
Form of
decree in suits
for reduction.

A suit for reduction of rent is as we have seen the only means by which a tenant may under Act VIII of 1885 claim an abatement. But the Bengal Tenancy Act has made no provision as to the form of a decree in such a suit and the time of its operation. It is obviously left to the discretion of the Court.

¹ Act VIII of 1885, Sec. 36. ² *Ibid.*, Sec. 37 Sub-Sec. (1).

If any dispute arises as to the terms and conditions under which a tenant holds or as to other incidents of the tenancy, the Court having jurisdiction may decide it. In the districts where Act X of 1859 is still in force, the incidents are determined by the Collector's courts. Sections 8 and 9 of the Act corresponding with sections 9 and 10 of Act VIII (B C) of 1869 prescribed a rough procedure for the delivery of pottahs and kabuliats. Section 2 of these Acts, following the old Regulations as to the delivery of pottahs to tenants, declared the right of every raiyat to receive a pottah. The instrument had to specify the quantity of land, with boundaries, the amount of annual rent, the instalments of rent and any special conditions of the lease. The intention of the Legislature was that there should be a written record of the exact terms and incidents of the tenancy, so that future disputes might be avoided. If the tenant desired to have a pottah he could institute a suit for the purpose, and the Court was to take evidence and determine the questions as to which the parties differed.

Determina-
tion of the
incidents of
tenancy and
delivery of
pottahs

A raiyat with a right of occupancy was entitled, when there were disputes and differences between the parties and the terms of the contract were difficult to ascertain, to a pottah on such terms as to the Court might seem fair and equitable under the circumstances of the case. Raiyats with rights of occupancy were the only class of persons who were interested in suing for pottahs. But no suit could be entertained, unless the relationship of landlord and tenant existed, and the tenant was in possession of the land. Questions of title or the right of the tenant to hold the land could not be determined in suits for pottahs.¹

✓ Pottahs at fair
and equitable
rates under
Act X of 1859

¹ Campbell v Kissen, Marsh Rep. 67, Haree Parsad v Asmut, Marsh Rep 99, Syed v Bakur, 3 W R (Act X) 3, Bharut v Oseemooddeen, 6 W R. (Act X) 56

Suits for
kabuliats
under Act X
of 1859.

When the landlord desired to have a *kabuliat* or a counter part engagement from a raiyat, he was bound to tender a pottah to the raiyat, such as the raiyat was entitled to get, and he was not entitled to a *kabuliat* by a suit if he had not previous to its institution tendered to the raiyat a pottah specifying the terms and incidents of the tenancy. Suits for *kabuliats* became generally unsuccessful for non tender of pottahs or erroneous statements therein¹. A suit for a *kabuliat* was not intended to be a suit for enhancement. Its principal object was to record the incidents of the tenancy. Neither could a landlord convert a suit for a *kabuliat* into one for establishing the relationship of landlord and tenant or indirectly get the trial of the question of the validity of a lease already granted or any question as to title to land. It is unnecessary to add that one of a number of co proprietors could not under the Acts of 1859 and 1869 sue a tenant for a *kabuliat* for a proportionate part of a holding, nor could he sue a tenant for a separate *kabuliat* for his own share of the rent.²

Determina-
tion of the in-
cidents of
tenancy
under the
Bengal
Tenancy Act.

The provision made in section 158 of the Bengal Tenancy Act is simpler and easier to work out. Either the landlord or the tenant whether he is an occupancy raiyat or not, may sue for the determination of the incidents of the tenancy i.e. the terms and conditions thereof and all or any of the matters specified in the section. The Court having jurisdiction to determine a suit for possession of the land has power to entertain an application under the section and an order passed thereon has the effect of a decree and is subject to the like appeal as a decree. But an application under the section cannot be converted into a suit to determine rights to land or the existence of the relationship of landlord and tenant. In *Bhupendro Narayan*

¹ Golam Mohamed v. Asmut. 10 W R. (F B.) 14; Gogon v. Kashishwary L. L. R. 3 Cal. 498.

² Abdool Ali v. Yar Ali, 8 W R. 467

Dutt and others v Nemye Chand Mondul,¹ the High Court held that a Court acting under the section was bound to go into and decide the question of the validity of the lease under which the defendant held. This ruling was not in accordance with the rulings under the sections of the Acts of 1859 and 1869, dealing with pottahs and kabuliats. The question was referred to a Full Bench², and the decision in *Bhupendro Narayan Dutt v Nemye Chand Mondul* was practically overruled, and it was held that a Court dealing with a case under section 158 of the Bengal Tenancy Act had the same limited powers as the Collector under sections 8 and 9 of Act X of 1859.

Chapter X of the Bengal Tenancy Act contains rules of procedure for the record-of-rights and settlement of rents of tenants in an estate or tenure or any other local area. The law as to enhancement or abatement of rent and the determination of the incidents of tenancy, applicable to an individual tenure-holder or raiyat, is also applicable in proceedings under chapter X.³ The cadastral survey under the Act deals with a large and cultivated tract, inhabited by a number of raiyats, the main objects of a proceeding before a revenue-officer being to obtain uniformity in the rate of rent and adjustment of disputes between landlords and tenants. If rent is settled, the enhancement or abatement, as the case may be, is intended to be uniform throughout, the equalisation of rent being disturbed only where a raiyat or a class of raiyats is entitled to hold for some special causes at favourable rates.

Record-of-rights and settlement of rent

What the delivery of a pottah and the taking of a kabuli at or the determination of the incidents of the tenancy is to an individual raiyat or a particular holding, the record-of-rights is to all the raiyats in a local area. A revenue-officer, acting under chapter X of the Bengal Tenancy Act and preparing merely a record-of-rights,

Powers and duties of a revenue-officer in preparing a record-of-rights

¹ I L R 15 Cal 627 ² *Debendro v Bhupendro*, I L R 19 Cal 182

³ *Gouri v Reilly*, I L R 20 Cal. 579

has to find out the existing state of things and his duties are similar to those of a Collector or a Court under section 10 of Act VI (B C) of 1862 and section 38 of Act VIII (B C) of 1869. Under the Acts of 1862 and 1869 the powers of a Collector or a Court were limited to recording what was and not what ought to have been. The duties of a revenue officer are prescribed in sections 102 and 103 of the Act of 1885 and in the rules made by the Local Government as to cadastral surveys. A revenue officer has the same powers as a Civil Court in determining the particulars given in section 102. But though he must find out the name of the landlord of a tenant it has been held that he cannot determine questions involving boundary disputes¹ or the validity of a revenue free grant set up by a person in actual occupation of any piece of land². If the proprietor of a neighbouring estate claims to be in possession of any piece of land as a part of his own estate the revenue officer has no jurisdiction to try whether the land appertains to his estate or the estate which is being surveyed. At most, he may under the Survey Act of 1875³ summarily determine the question of present possession. So if a third person sets up a claim to possession under a title to hold the land revenue free based on a grant made before the Permanent Settlement the revenue officer it has been held should withhold his hands and refer the parties to a Civil Court.⁴ The claim however must be a *bona fide* one and not intended to frustrate the survey or record of rights. If on the other hand a person in actual occupation sets up a rent free title acquired subsequent to the Permanent Settlement he becomes a tenant within the meaning of the Bengal Tenancy Act, and the jurisdiction of the revenue-officer is not ousted⁴. The sections of the Act deal

Norendro v. Srinath 1 L. R. 19 Cal. 641; Bidhu v. Bhugwan 1 L. R. 19 Cal. 643.

² Secretary v. Nitye, 1 L. R. 21 Cal. 381; Karmal v. Brojo 1 L. R. 22 Cal. 244. ³ Act V (B C.) of 1875 Sec. 42.

⁴ Gokhul v. Jodu 1 L. R. 17 Cal. 721.

ing with the powers and duties of a revenue officer, and the powers of Special Judges appointed under the Act and of the High Court on second appeal are not free from ambiguity, and the rulings thereon are consequently not quite in harmony. The jurisdiction of the ordinary Civil Courts to modify the awards of a revenue-officer in matters, which come within his powers and duties, is also very doubtful.

The revenue-officers entrusted with the duties of recording the rights of the tenantry in large areas and revising their rents may be excellent executive officers, but are not generally persons who have proper judicial training. The procedure adopted by them is practically summary, and the people have not much confidence in their decisions. The circumstances, which induced the Government of Bengal to repeal Act X of 1859 in the Regulation districts and to transfer in 1869 the jurisdiction in the trial of cases between landlord and tenant to the ordinary Civil Courts, exist even at the present day, and although in theory the Collectors of districts and their subordinates may be supposed to be more conversant with questions about land - its produce and productive power—in any particular locality than the local Moonsiffs and Subordinate Judges, the truth seems to be that they are far inferior to the latter in judicial power and acumen. All that can be said in favour of the executive officers is that they have a rough and ready way of cutting gordian knots. However that may be, Chapter X of the Bengal Tenancy Act requires considerable modifications. The experience of ten years since the passing of the Act should be utilised without any bias for either the executive or the judicial officers of the Crown. All necessary powers for the satisfactory and final adjustment of the various kinds of disputes that may and do frequently arise in recording or settling rents and determining the relationship of landlord and tenant, —in finally determining all the particulars noted in

Remarks

section 102,—should be given to competent officers, and appeals to the highest tribunal in the country should be allowed on all questions of vital importance, so that there may be complete finality and no conflict of jurisdiction after trial by one set of judges. Summary decisions based on present possession and references to or revision by Civil Courts leading to suspension of proceedings are anomalous and productive of mischief.

Objections to
particular en-
tries

After making the necessary enquiries by survey and measurement and taking evidence as to rates of rent &c. a revenue-officer is required by section 105 of Act VIII of 1885 to publish locally a draft record called the *khasra*¹. If objections are made as to particular entries he should decide them² and an appeal lies against his order as to any particular entry to the Special Judge appointed by the Local Government under section 108. The decision of the Special Judge may be revised by the High Court in second appeal if there is merely a record of rights and not a settlement of rent³. The decision thus arrived at after a dispute as to any particular entry seems to be final and conclusive⁴. As regards undisputed entries there is a presumption as to their correctness until the contrary is proved⁵.

Duties of a
revenue-
officer settling
rent.

Rent may be settled under section 104 on the application of either the landlord or the tenants. The rules of law that should guide a revenue officer in settling rents are not given in chapter X of the Act, but he is apparently bound by the same rules as a Civil Court in particular cases of enhancement or abatement of rent⁶. In a proceeding under section 104, rent may be enhanced or reduced and the rates of rent may be

Rules framed by the Local Government Nos. 20 to 34.

Act VIII of 1885, Sec. 105.

Ibid, Sec. 108.

Ibid, Sec. 107.

⁴ Ibid Sec. 109.

Goar v Reilly 1 L. R. 20 Cal. 379.

equalised with respect to the raiyats as a mass. Either the landlord or the raiyats or any of them may contest the enhancement or abatement of rent, as the case may be, and the Special Judge appointed by the Local Government may hear appeals against the orders of a revenue officer on such objections¹ No second appeal, however, lies to the High Court in a case of settlement of rent, the decision of the Special Judge being final²

When rent is settled under chapter X, it takes effect from the beginning of the agricultural year next after the final publication of the record by the revenue-officer³ Except on the ground of landlord's improvement or subsequent alteration in the area of a tenure or holding, the rent so settled is not liable to any alteration for a period of fifteen years from the date of the final publication of the record in the case of an occupancy-raiyat or five years in the case of a non-occupancy-raiyat.

When and for what period rent settled has operation

The agrarian disturbances in the district of Pabna and parts of the districts adjoining it had induced the Government of Bengal to pass a short Act⁴ known as the Agrarian Disputes Act of 1876 The special procedure laid down in that Act was applicable only in exceptional cases, where the relation between the landlord and the tenants as a class was very much straitened Section 112 of the Bengal Tenancy Act has conferred upon the Local Government the same powers as the Agrarian Disputes Act These powers have not been exercised in recent years The Local Government may exercise its powers only with the previous sanction of the Governor-General in Council.

Agrarian Disputes Act.

¹ A&T VIII of 1885, Sec 108

² *Shewbarat v Nirpat*, I L R. 16 Cal 596, *Lala Kirut Narain v Palukdhari*, I L R. 17 Cal 326, *Gopinath v Adaita*, I L R 21 Cal 776, *Anand v Shib*, I L R 22 Cal 477 See also *Upadhya v Persidh*, I L R. 23 Cal 723

³ A&T VIII of 1885, Sec 110.

⁴ A&T VI (B C) of 1876

Enhancement
of the rent of
a non-occu-
pancy raiyat.

The rent of a non-occupancy raiyat may be enhanced under the procedure laid down in section 46 of the Bengal Tenancy Act. The Court is required to find out what rent is fair and equitable which, in the words of the Bengal Tenancy Act, should be determined by reference to rents generally paid by raiyats for lands of similar description and with like advantages in the same village. If the raiyat agrees to pay the rent so determined, he is entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement. But on the expiration of that term, his rent may be again varied and he may be called upon to pay what the Court may consider fair and equitable at the time. The rules as to enhancement of rent are necessarily much the same as those with respect to occupancy raiyats, though non-occupancy raiyats have not many of the privileges of occupancy raiyats. A revenue-officer may in a proceeding under chapter X settle the rents payable by non-occupancy raiyats in any local area in accordance with the rules laid down in section 46, and the rent of a holding so settled cannot also be varied within five years, except for alteration of area or improvement by landlord.

LECTURE XII

NON-AGRICULTURAL LANDS.

In ancient times, the three principal sources of a king's revenue in India were his share in the produce of agricultural lands (*vali*), taxes levied upon homestead lands either in villages or towns (*kara*) and taxes realised from persons carrying on trades and industries (*sulka*). The great lawgiver says—"The king, who receiving *vali*, *kara* and *sulka* does not afford protection to his subjects, goes into hell"¹

Sources of
revenue in
Ancient
India

Of these three sources of royal revenue, the most important was *vali*, and reference was frequently made to it by the text-writers². The Anglo-Indian Government has, like the Mahomedan Government, devoted its best attention to this important branch of royal revenue and to the protection of the agricultural population by whom it is payable

Vali.

In ancient days and throughout the Hindu period, the word *kara* was used for money-rent payable for land, as distinguished from a share of the produce of agricultural lands. The money-rent payable for homestead lands by artisans, tradesmen and labourers, quit-rent paid by persons who were favoured by the king and who held under royal grants, and all other taxes paid for the use and occupation of land or water came within this branch of revenue. In agricultural villages, a shop-keeper supplying articles to the agricultural population was required to pay the

Kara

¹ योऽरचन् बलिमादत्ते करं शुल्कञ्च पार्थिव ।

प्रतिभागञ्च दण्डञ्च स सद्यो नरकं व्रजेत् ॥ —Manu, Chap VIII, 307

² Ante p 8

tax known as *kara* for his homestead land. The income from this source, however, was small and very little importance was attached to it, though the freak of language has transmitted the word to the present day, and it has now a much wider significance, and the word *raia* has dropped down in the course of time.

Sulka. *Sulka* (duties) which included various items of income such as market-dues, duties on articles imported and exported and the fees realised from mechanics and artisans became more and more an increasing source of income with the progress of society. In the later Hindu period and during the Mahomedan period, it played a very important part in the finances of the Indian government.

Homestead lands. The homestead lands occupied by the higher classes of people in Indian society were generally revenue-free, the exemption being due to causes which I have already attempted to explain.¹ The homestead lands of the agricultural population and their *udbastu* i.e. lands outside the homestead but necessary for other than agricultural purposes went along with their arable fields and even when rent was separately payable for them the incidents were generally the same as those of arable lands.² If a rayat holds a piece of land as a part of an agricultural holding all the incidents of occupancy right attach to it as to the rest of the lands in the holding. If it is not a part of an agricultural holding but is land in the same village held under the same landlord and necessary for the habitation of the rayat and his family local custom and usage regulate its incidents, and, subject to such local custom or usage the provisions of the Bengal Tenancy Act are applicable.³ But as regards homestead lands of a character different from either of the above the Rent Acts of 1859 and

¹ Ante p. 315.

² Ante p. 317. See A. V. VIII of 1885, Sec. 182. Mohesh v. Bishonath, 24 W. R. 402.

³ A. V. VIII of 1885, Sec. 182. Nyamatoolah v. Govind, 6 W. R. (A. V.) 401. Pogose v. Rajee, 22 W. R. 511; Prosnado v. Jagan, 10 C. L. R. 25.

1869 and the Bengal Tenancy Act have no application to them¹. If a raiyat holds agricultural land under one landlord and homestead land under another, he cannot acquire a right of occupancy in the latter. A person who has acquired a piece of land for residence and not for cultivation is not a *raiya*t with respect to it, if it is not a part of an agricultural holding. The holding of agricultural land in one village does not entitle a person to be a "settled raiyat" with respect to homestead land held in another village or under a different landlord. ^{GLs S. 1822m} The mere fact that a person cultivates land himself or by hired labour does not make him a raiyat with respect to land held by him for a shop in an adjoining town. An indigo planter, who has acquired a right of occupancy with respect to indigo lands, may have his residence in the civil station of the district in which he has his factory, or a tea planter may have similar residence within the municipal limits of the town of Darjeeling, but he is not entitled to claim a right of occupancy with respect to the land held by him for such residence.

There are no legislative provisions as to non agricultural lands, except such as are contained in the Transfer of Property Act, the Indian Contract Act and stray sections in the Revenue and Rent laws. Act X of 1859 and Act VIII (B C) of 1869, as I have said, did not touch the question of the rights and liabilities of tenants of homestead and other non-agricultural lands, though the ever-increasing population, agricultural as well as non-agricultural, demanded legislation. When Act VIII of 1885 was in course of preparation, an unsuccessful attempt was made to have a comprehensive code for lands agricultural as well as non agricultural. The rules of justice, equity

The law applicable to non-agricultural lands

¹ *Kalee v Kalee*, 11 W R 183, *Nymooddee v. Moncrieff*, 12 W R 140; *Kylash v Wooma*, 24 W R. 412, *Collector v Hakim*, 25 W R. 136; *Purna v Sadut*, 2 C L R 31

and good conscience are not always easy of access, and mistakes are common. Custom and local usage are generally difficult to prove. The invocation of the principles of the law of landlord and tenant, as it prevails in England without reference to the instincts and conditions of life of the people of this country, is occasionally a source of great mischief. Trained in England trained in thoughts peculiar to the English people, many of the judges and lawyers in this country believe the English rules of land law to be the most equitable and just and they are tempted to apply them to tenancy in this country whenever they have to decide cases according to justice equity and good conscience. Even the Legislature is not entirely free from this vice of adopting exotic principles without regard to the customs and habits of thought of the people to be governed by them. To a nation which has the most sacred regard for the land where its ancestors lived, to persons who have extraordinarily deep affection for ancestral homesteads—dearer than heaven itself the idea that no right can be acquired in homestead land, however long the period of occupation may be is repugnant in the extreme. People have generally a notion that the holder of a piece of homestead land acquires by long occupation the right to continue in possession of it and the legal profession and the judges have very frequently to undeceive them. The hardship of the law as it is at present administered is well known. An abortive attempt was made to remedy the evil by legislative enactment but the opposition was strong. There is now no chance of the legislature interfering in the matter, at least for some time to come.

The Transfer of Property Act not applicable to contracts made before it came into force.

The chapter on Leases in the Transfer of Property Act is short and the interpretation of the few sections is not always easy. For the sake of convenience however I shall adopt the arrangement given in the Act. Much of what has already been said as

to the incidents of temporary leases applies to leases of non-agricultural lands. The relationship between the landlord and tenant may, however, be complicated by substantial structures being raised on the land. But it is doubtful how far the rules laid down in the Transfer of Property Act may regulate the incidents of tenancies created before it came into operation. Substantive laws do not, unless retrospective effect be clearly intended to be given, affect the vested rights of parties,¹ and the Transfer of Property Act has also expressly provided in section 2 that "nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability." If, according to the law, as understood before the passing of the Act, a tenant of homestead-land, who had been allowed by the landlord to erect buildings on it, had the right to erect further buildings, for the accommodation of himself and his family, section 108, cl (p) ought not to affect that right. The Act itself is not exhaustive. It defines and amends certain parts only of the law relating to voluntary transfers *inter vivos*,² and does not affect the terms of any contract not inconsistent with the provisions of the Act.³

As in the case of agricultural lands, the notion that now underlies all tenancies of homestead-lands as also other non-agricultural lands is that the absolute proprietary right is in the landlord. He may, by creating a subordinate tenure, have his right curtailed to the extent indicated by the contract, but the tenant in actual occupation has ordinarily no other right than what is given expressly or by necessary implication by it. Custom and local usage may

No right can be acquired by mere occupation by a tenant

¹ Maxwell on the Interpretation of Statutes, 2nd Ed, p 257

² Act IV of 1882, Preamble

³ *Ibid*, Sec 2, cl. (b)

import rights and liabilities not inconsistent with the express covenants in the contract. In the absence of any unambiguous condition as to the duration of a lease a tenant holds from month to month or from year to year and is liable to be ejected after the service of a proper notice to quit. The tenant acquires no right by mere occupation. He has no statutory right as his agricultural neighbours have. Rent may be enhanced at the option of the landlord after the expiration of the term of the lease, and ordinarily the law places no limit to his demand.

The Revenue-Sale Laws as to homestead lands.

Regulation XLIV of 1793 the first law passed for the sale of estates for arrears of revenue encouraged the erection of buildings or dwelling houses by enacting¹ that a purchaser on a sale for arrears was not entitled to eject tenants who had erected dwelling houses on the lands leased to them by the defaulter². This provision was repeated in the Sale Laws passed from time to time and has still a place in the existing laws for the sales for arrears of revenue³ or rent⁴. This protection from eviction extends to leases of land whereon manufactories and other permanent buildings⁵ have been erected and lands whereon tanks, permanent gardens plantations canals places of worship and burning and burial grounds have been made. A sale free of encumbrances vests in the purchaser the right to cancel all perpetual leases granted by the defaulter but though a permanent lease at fixed rent of land made for the erection of buildings or manufactories may be cancelled on a sale for arrears the tenant must be allowed to remain on the land on payment of fair and equitable rent,

¹ Reg. XLIV of 1793 Sec. 9.

Act XI of 1859, Sec. 37 cl. (4); Act VII (B. C.) of 1868, Sec. 13 cl. (4).

² Act VIII of 1885 Sec. 160 cl. (c).

³ Act XI of 1859, Sec. 37; Act VIII of 1885, Sec. 160, cl. (c).
Bhago v. Ram 1 L. R. 3 Cal. 293; Ajgur v. Asmut 1 L. R. 8 Cal. 110.

the land being liable to be assessed at a higher or pre-ailing rate, without reference to the original contract. Ejectment does not necessarily follow the cancellation of a lease.

A suit for the enhancement of rent of non-agricultural land, when the law does not allow the ejectment of the tenant on the expiry or cancellation of his lease, is maintainable in the ordinary Civil Courts.¹ There were many instances of enhancement of rent through the medium of the Revenue Courts, when Act X of 1859 was in force and the Act was supposed to apply to all kinds of tenancies, but according to the view taken by most of the judges of the High Court,² the Revenue Courts had no jurisdiction to entertain suits with respect to homestead-lands, and the decrees passed by them were *ultra vires*. If a tenant, however, has paid at the enhanced rate according to any decree passed by a Revenue Court, that fact will go against the permanency of the tenure, but the judgment and decree are inadmissible for any other purpose, having been passed by an incompetent court. There is no codified law for a suit for enhancement of rent of non-agricultural lands. Section 11 of the Code of Civil Procedure (Act XIV of 1882) empowers the Civil Courts to entertain and try all suits of a civil nature, and in trying a suit for the enhancement of rent of non-agricultural land, a Court must act according to principles of justice, equity and good conscience.

Suits for enhancement of rent of homestead-lands

It has been held that a proper notice of enhancement is a necessary preliminary to a suit for the enhancement of rent of non-agricultural land, just as it was in suits for enhancement under Act X of 1859 and Bengal Act VIII of 1869.³ But with the repeal of the procedure laid down in those Acts and the

Notice of enhancement.

¹ Thomas v Greedhur, W R, Sp Vol (A & X) 9

² Ante pp 285-6

³ Ante pp 373-4.

substitution of the procedure in Act VIII of 1885 dispensing with the previous service of any notice the procedure in suits for enhancement of rent of non agricultural lands ought to be changed as an unnecessary preamble I think no notice will now be deemed necessary, and our Courts must determine what rent is fair and equitable whenever rent is enhanceable by suit and the landlord wants an increase. A decree for enhancement may be directed to come into operation at a reasonable time subsequent to the institution of the suit.

Plantations
and gardens

Tenants holding permanent gardens and plantations are protected if the occupation of the tenant has been long enough for the acquisition of occupancy right, but the protection afforded by the Sale Laws extends to all leases without reference to the period of occupation by the tenant. The general incidents of the tenancy of land used for purposes other than agricultural are the same in all cases¹. *Fulkars* or fisheries as also lands used for *hats bazars* and shops come within the same category.

Duration of
leases.

A lease is a transfer of the leasehold premises to be held by the lessee under the covenants and conditions expressed in the contract or implied by law, and the lessor may create any interest in the lessee, sanctioned by the policy of law, within the limit of his own interest in the property². A full owner in possession may demise land on any terms and conditions, consistent with the policy of law. A contract of lease binds the heirs, representatives and assigns of the lessor as well as the lessee with respect to covenants that run with the lands³. Even if the lessor is not in possession and has merely a right to possession he may grant a lease which is to come into operation as soon as he is entitled to actual possession. A mere right of entry, whether immediate or future, may be

¹ Gobind v. Joy I. L. R. 12 Cal 327

² Act IV of 1882, Secs. 105 and 108 cl (j)
Act pp 225-6.

demised by a lease, but a lessor who has a right to re-enter only on a breach of condition by a lessee cannot give the right to a new lessee to sue upon the breach of the condition¹. Neither can a person, entitled to the possession of immovable property on the death of a Hindu female, bind himself by a lease executed by him during the life time of such a female, his right being a mere possibility, but he may give a valid title to a lessee, which may enure after her death, by assenting to the lease. The holder of an estate for life or a person holding an estate for a term of years may grant leases, but they cannot enure beyond the life or the term of the lease of the grantor himself. On the determination of the lease, the true owner is entitled to the possession of the land in the same state in which it was at the date of the demise.

In the absence of a contract or distinct proof of custom or local usage, a tenancy for manufacturing purposes is deemed, according to the Transfer of Property Act, to be a lease from year to year, and a tenancy of ordinary homestead-land to be a lease from month to month². Leases of land in the *mofussil* are, however, with rare exceptions, *annual*, the rent being payable according to the Bengali Calendar, where the Bengali year prevails, or the Fushl or Wilaity Calendar. In Bengal proper, a year of tenancy generally ends on the last day of Chaitra, and in Behar and Orissa on the last day of the lunar month of Bhadra. Notwithstanding what is contained in section 106 of the Transfer of Property Act, the vast majority of leases of non-agricultural lands are thus from year to year, terminable only at the end of the year. Tenancies from month to month are only found to exist in very populous cities and within municipal limits. In fact, having re-

Tenancies
from year to
year

¹ Hunt v Bishop, 22 L J Ex 337, Hunt v Remnant, 23 L J Ex

² Act IV of 1882, Sec 106

gard to the well known practice in the *mofussil* of the country leases of immovable property ought to be held from very slight evidence to be from year to year in the absence of well proved contract or local custom or usage to the contrary notwithstanding that the Transfer of Property Act has laid down a contrary rule ¹ A Tenancy from year to year can be determined only by a six months notice to end with the last day of the year ²

Transferability

These leases are transferable absolutely or by way of mortgage though notwithstanding the transfer, the original lessee does not cease to be subject to any of the liabilities attaching to the lease. The transferee of such interest may again transfer it ³ But the express terms of a contract or any local usage which must be distinctly proved in each case may make a lease of non agricultural land non transferable. The fact that in an ordinary lease of agricultural land the right of an occupancy or non occupancy raiyat is not transferable by law leads people to think that leases of homestead lands are also non transferable. Before the Transfer of Property Act came into force the law was supposed to be that without an express contract and in the absence of local usage, tenures of non agricultural land were not transferable ⁴ In *Noraindra Narain Rai v Ishan Chandra Sen* ⁵ it was held that on the transfer of a right of occupancy the transferee, in the absence of custom or established local usage became a trespasser and the same rule was applied to leases of non agricultural lands. But in *Benimadhab Banerjee v Jaitkrishna Mukerjee* ⁶ Peacock C J said — Speaking for myself I should say that if one man grants a tenure to another

¹ *Kishori v Nund* I. L. R. 24 Cal. 720.

² *Kishori v Nundkumar* I. L. R. 24 Cal. 720.

AA IV of 1882, Sec. 108, cl. (f) ⁷

³ *Kripa v Durga* I. L. R. 15 Cal. 89.

⁴ 13 B. L. R. 274, cc., 22 W. R. 22. See ante pp. 299-300.

⁵ 7 B. L. R. 152, cc., 12 W. R. 495.

for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest, he does not necessarily get rid of his liability to pay the rent reserved. A tenant who assigns his interest does not, in my opinion, commit such forfeiture of his rights as to entitle the lessor to treat such rights as altogether non-existent, and to turn him out of possession."

In the absence of a contract or local usage to the contrary, the right of a lessee is heritable and is capable of being bequeathed according to the laws of testamentary and intestate succession

om
Heritability

During the continuance of the lease, the lessee is bound to use the land as a person of ordinary prudence would do¹. He must not use or permit another to use it for a purpose other than that for which the lease has been granted - Land let out for use as homestead ought not to be used for digging a tank, nor has the tenant the right to dig earth for the purpose of making bricks. Such a use of the land is opposed to the original purpose of the tenancy and is supposed to deteriorate its value².

om
Misuse of
land during
lease

In the absence of an express contract, a temporary lessee is also not entitled to work mines or quarries, not open when the lease was granted, or to commit any other act which is permanently injurious to the land demised³. But I think a person, holding under a perma-

om
Working
mines or
quarries

¹ Act VIII of 1885, Sec 108, cl (o), *Ramanadhan v Zamindar of Ramnad*, 1 L R 16 Mad 407. See also *Meux v Cobley*, 2 Ch (1892) 253.

² *Bholai v The Rajah of Banst*, 1 L R 4 All 174, *Noyna v Rupikun*, 1 L R 9 Cal 609.

³ *Nicholl v Tarinee*, 23 W R 298. *Tarini v Debnarayan*, 8 B L R App 69, *Manindro v Moneeruddeen*, 11 B L R App 40, *Lakshmana v Ramachandra*, 1 L R 10 Mad 351.

⁴ *In re Purmanandas*, 1 L R 7 Bom 109.

ment lease in which there is no reversion to the land lord, has the right to open mines and if he does so his act, unless there is an express covenant to the contrary, does not amount to legal waste. When the lease is granted by a proprietor not for any specified purpose and he reserves only the right to receive quit rent in perpetuity such a use of the land cannot affect him. Permanent leases are practically conveyances of land and it seems to me that the lessees have full right to use the lands demised as they please provided there is ample security for the proprietors dues. *Prima facie* the owner of the surface is entitled *ex jure naturæ* to every thing beneath or within it.¹ The working of mines does not, as a rule permanently injure the land or destroy it to the detriment of the landlord's interest. The same thing may be said as to the working of quarries. The evident intention of the framers of the Transfer of Property Act, in inserting clause (o) in section 108 is to prevent temporary lessees from doing such acts as may affect the value of the demised premises, and to secure, on the termination of a lease, the restoration of the property in as good a condition as it was at the time when the tenant was first put into possession. In cases of permanent leases their termination is never in the contemplation of the parties. It is no doubt the duty of a tenant to keep the property as much as possible, in the same condition as it was at the beginning of the lease but the duty is imperative only where the landlord has any thing to lose by a change inconsistent with the original purposes of the tenancy. A lessee or a tenant for life or for years has as between himself and his lessor or the reversioner the right to work open mines and quarries.² But he is not entitled it seems to open or work a new

¹ *Smith v Darby* L. R. 7 Q. B. 716 (722); *Newcomen v Coulson* 5 Ch. D. 133 (142); *Egremont v Egremont* 14 Ch. D. 158 (162).

² *Owen Elias v The Snowdon Slate Quarries Co.* L. R. 4 App. Cases 454; *Tucker v. Linger* L. R. 8 App. Cases 508

mine or quarry Such an act on his part amounts to legal waste.¹ The words of section 108, cl (o) are, however, very broad, and apparently includes leases of all kinds, irrespective of their duration and nature You should remember that the law does not import any distinction between the surface and the underground, when the contract of lease does not convey it in express terms

According to the law as laid down by the great law-giver of ancient India, the king is entitled to a half share of hidden treasures underneath the earth and of *minerals*, as his share for the protection afforded by him to his subjects ² *Medhatithi* in commenting on the word *mineral (dhatu)*, includes in it gold, silver, iron, vermillion, collyrium and all other minerals to be worked out of the earth or found in hills and other places ³ He adds that the king's share is not necessarily a half, the word 'half' (*ardha*) being illustrative only, the king being entitled to a sixth or any other share according to custom The text and the gloss, however, refer to a state of things quite different from what we have at the present day The Anglo-Indian Government has, by the Permanent Settlement, accepted fixed sums as revenue in lieu of all the rights it had either as proprietor of the soil or as the protector of its subjects It reserved no right whatsoever, except as to treasures under the Treasure Trove Act ⁴

Right to minerals according to Hindu Law

¹ Act IV of 1882, Sec 108, cl (o) The law as to mines is in a doubtful state in Bengal As regards Ghatwali lands see p 263 See also Gordon Stuart & Co v Tikaitnee, W R (1864) 370

² निधौना तु पुराणानां धातूनामेव च चितौ ।

अर्द्धभायक्षणाद्राजा भूमेरधिपतिर्हि स ॥

Manu, Chap VIII, v 39

³ सुवर्णरुप्यादिवीजनिद सिन्दूरकालाञ्जनाद्याश्च धातवः । सुवर्णाद्याकरभूमेर्य खनति योवा पर्वतादिषु गैरिकादिकादिधातूनुपजीवति * * * अर्द्धभागिति अर्धशब्दोऽश्मासवचन.—*Medhatithi's* Commentary See also Nandan's Commentary—धातूनां हेमरुप्यादिलोहगणानां मृत्तिकाविशेषाणाम् ।

⁴ Act VI of 1878

Minerals must necessarily pass with the right to the surface. The present theory of the proprietary right of the Government is not consistent with the Hindu theory of the king's right to a share of the produce or of hidden treasures and minerals, and the Anglo Indian Government having accepted and acted upon the theory of the proprietorship of the soil cannot now claim a share of the minerals on the latter theory. The transfer to permanent tenure holders of the right which the zemindars derived from the government necessarily conveys the right to the minerals underneath.

The lessee must not without the lessor's consent erect on the property any permanent structures¹. If land is let out for use as homestead by raising structures such as are ordinarily used in this country—the structures being easily removable—the erection by the tenant of brick houses not easily removable is an use of the land to which the landlord may object. If however the landlord instead of objecting to the erection of a brick house remains passive and allows it to be built knowing that his security for rent would be enormously increased by it he should not afterwards be allowed to sue the tenant for misuse of the land². The landlord may restrain his tenant from erecting without his consent substantial buildings by getting an injunction issued in time³ but it is contrary to all principles of equity and good conscience to allow him to insist upon the removal of a building at the termination of the lease. It is therefore an obligation on the tenant not to erect such building as would throw obstacles to the landlord's undoubted right of re entry at the termination of the lease. The right of the tenant to remove, during the continuance of the lease, all

AG IV of 1892, Sec. 108, cl. (f)
 Noyna v Rupikun I. L. R. 9 Cal. 609.
 Jagganath v Prasanna 9 C. L. R. 221

6m
 Erection of
 permanent
 structures

Waiver

things he has attached to 'the earth' is one for his own benefit, which he may or may not avail himself of. If he wishes to continue on the land having without objection raised during the term of the lease substantial structures, the landlord cannot eject him. No Court will permit a man knowingly though passively to encourage another to lay out money in improving his property, and then to assert his legal right against him, without at least, making him pay full compensation for the money that has been expended. Equity intervenes and prevents the landlord from turning out a tenant who has erected substantial structures on the land,¹ to his knowledge or with his consent, which may be presumed from his previous non action. If he waits till the building is completed, and then asks a Court of justice to eject the tenant or have the building removed during the pendency of the lease, a mandatory injunction will not generally be granted. It is always in the discretion of the Court to grant Injunction injunctions or not. But Courts of law are always reluctant to help a man, though he may have an undoubted right, if he is guilty of laches.² The circumstances of each case must be taken into consideration, and if the injured man comes into Court at the first opportunity after the building has been commenced, an injunction may be granted. But if the plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but waited till the building has been finished, and then asks the Court to have it

¹ Act IV of 1882, Sec 108, cl (4)

² *Dann v Spurrer*, 7 Ves 131, *the Rochdale Canal Co v King*, 16 B & W 630, *the Somersetshire Canal Coal Co v Hircourt*, 24 Beav 571, *Ramsden v Dyson*, L R 1 E & I A C 129, *Musst Rani v Sheikh Jan*, 3 B L R, A C, 18, *Bani v Jai*, 7 B L R 153, *sc*, 12 W R 495, *Durga v Brindabun*, 7 B L R 159, *Braja v Stewart*, 8 B L R App 51, *Shib v Bamun Das*, 8 B L R 237 *sc*, 15 W R 360. See Act IV of 1882, Sec 15

³ *The Shamnigger Jute Factory v Ram Narain Chatterjee*, 1 L R 14 Cal 189

removed a mandatory injunction will not generally be granted. A mere notice not to continue the erection of a building when not followed by legal proceedings is not a sufficiently special circumstance for granting such a relief.¹ It has however been held in some cases that a tenant's *bona fides* should be taken into consideration and if he knowingly did an act to the prejudice of his landlord equity would not help him.²

You have seen that under the law as is now administered occupation of homestead land whatever the period may be does not create in the tenant any right to continue on the land after the determination of the lease which may be effected by a legal notice to quit.³ A presumption of permanency may however arise from long occupation at uniform rent if the original grant is lost and is not provable. The conduct of the parties may raise an inference that the *lost grant* created a permanent tenure. It has been held that where land is let out for the tenant's residence and he has with the knowledge of the landlord laid out large sums upon the land in buildings or other substantial improvements that fact coupled with long continued enjoyment of the property may justify the presumption of a permanent grant if the original conditions of the tenancy are incapable of being ascertained.⁴ If a tenant, holding under a temporary lease of which the origin is known or is easily provable erects buildings on his land it may be said that he does it at his own risk

¹ *Benode v Soudamini* 1 L. R. 16 Cal. 252 and the cases therein cited. *Furkund v Aka* 3 C. L. R. 194.

Addoyto v P 1er 17 W. R. 383 & 13 B. L. R. 417 (note); *Mohar v Ram* 21 W. R. 400. *Prosunno v Sheikh Rutton* 1 L. R. 3 Cal. 696; *Taruk v Shyama*, 8 C. L. R. 50; *Prosunno v Jagannath* 10 C. L. R. 25; *Arut v Prandhona* 1 L. R. 10 Cal. 502.

Prosunno v Jagannath 10 C. L. R. 25; *Goriada v Aylmudda* 11 C. L. R. 281.

om
Presumption
of permanency from
long occupation

and as held in some cases, the tenant may not be entitled to plead the landlord's acquiescence in a suit for ejectment. A Court of Justice may also in such a case require the landlord to pay compensation to the tenant before granting a decree for ejectment, or may direct a removal of the buildings. But if the origin of the tenancy is unknown, and the exact terms are difficult to ascertain on account of unavoidable loss of evidence, and the tenant's occupation is not sufficiently long, the landlord should have no other right than to obtain fair and equitable rent, there being a presumption of the existence of a covenant between the parties that there should be no ejectment of the tenant, though the rent may be enhanced.

In the absence of any contract express or implied, a lessee holding non-agricultural land either for a term of years, or year by year, may transfer by way of sub-lease the whole or any part of his interest in the property. But the sub-lessee can have no right higher than that of the lessee, and is liable to be evicted on the determination of the lessee's interest, except in cases of surrender by the lessee.¹

ॐ
Subleases

Instances of leases for building purposes granted by Hindu widows are frequent in this country. Such a lease is good during the life-time of the widow, and in cases of proved legal necessity, the after-taker may also be bound by the conditions of the lease. But supposing the after-taker, on the death of a Hindu widow, is not so bound, a question has arisen as to the right of the lessee to the buildings or substantial structures erected on the land demised to him. Is he entitled to remove materials of the buildings? There can be no question as to unsubstantial structures erected by a tenant,—structures easily removable. *Narada* speaking of the right of a tenant holding under a terminable lease says—"If a man builds a hut on land

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Leases by
Hindu
widows

Fixtures

¹ Act IV of 1882, Sec 108, cl (j) and Sec 115. *Ante* p 241

helping to another and pays rent for it, he should be permitted to take with him the materials such as grass, wood and bricks when leaving the land ¹ But a reservation was made by the sage if the person in occupation by erecting structures was paying no rent for the land; and in such a case he should not be permitted to take away the materials and on his leaving the land they became the property of the land owner ² *Jagannatha* ³ commenting on the above texts would extend the rule to all classes of tenants. It would seem from the texts of *Narada* and the comments by *Jagannatha* that if a tenant quitted his homestead land what ever his status was after paying all that was due to the land owner for rent he was entitled to take away the materials but he was not entitled to do so until he discharged the landlord's dues. The materials of the tenant's structures became the landowner's property, the price of the same on the tenant's abandonment being set off against unpaid rent. Thus according to the ancient sages and the Hindu law as understood at the early period of the British rule in India the technical rule of English law *quidquid plantatur solo cedit* was not applicable. The *Hidayat* also says — If a person builds unoccupied land for the purpose of building or planting it is incumbent on the lessee to remove the buildings or trees &c ⁴

¹ परमूनी यङ्गं जला सोम दत्ता वसितु म ।

स तद्वस्तीना निवृत्तेन वपकाडाणि सिट्ठाम् ॥ — *Narada* as

quoted in *P. Parasaramadhave* Bibliotheca Indica P. Parasasmriti Vol III p 236 See *Iso Vivada Rato kara*, p 168.

² सोमादिना वसिता तु परमूमावसिपित ।

निर्वृत्तानवादादि य यतोसात् कथयन् ॥

यान्ते वपकाडाणि सिट्ठानिनिवेदिताः ।

विनिर्मन्त्यस्तत्तुल्ये भूमिभूमिनि वेदन्ते ॥

Bibliotheca Indica Parasasmriti Vol. III, p 236.

Digest Book 3, Ch. 2, p 99

⁴ *Hamilton & Hidayat* Vol III p. 325 (1st Edition)

No distinction was made between substantial and unsubstantial structures. The question arose early, as to the applicability in India of the English law as to fixtures, and the *Sudder Dewani Adawlut* held that it did not prevail in this country. The custom and usages of the country and the law as laid down by the sages were given effect to, even where the relationship of landlord and tenant did not exist between the parties.¹

In the matter of the petition of *Thakoor Chunder Paramanick and others*,² the question raised was whether an assignee from a Hindu widow, whose title terminated with her death, was entitled to remove the buildings erected by him during her life-time with her consent. Sir Barnes Peacock, C J, in delivering the judgment of the Full Bench said —“ We think it clear that according to the usages and customs of the country, buildings and other improvements made on land, do not by the mere accident of their attachment to the soil, become the property of the owner of the soil, and we think it should be laid down as a general rule that if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made or to obtain compensation for the value of the building, if it is allowed to remain for the benefit of the owner of the soil —the option of taking the building or allowing the removal of the materials, remaining with the owner of the land, in those cases in which the building is not taken down by the builder, during the continuance of any estate he may possess ”³

In re *Thakoor Chunder Paramanick and others*

¹ *W G Nicose Pogose v Niyamatula*, S D A (1851) 1517, *Jankee Singh v Bukhooree*, S D A (1856) 761, *Kalee Pershad v Gouree Pershad*, 5 W R 108

² B L R (F B) 595, *sc*, 6 W R 228 *Ante* pp 34-5

³ See also *Shib v Baman*, 8 B L R 237, *sc*, 15 W R 360, *Russick v Lokenath*, 1 L R 5 Cal 688, *Juggut v Dwarka*, 1 L R 8 Cal. 582.

Materials of
huts.

The inapplicability in India of the technical rule as to fixtures is further illustrated by the practice in all the large towns, where tenants are allowed to remove not only the materials of huts,¹ but substantial structures and buildings. In the Presidency towns as you have seen, materials of huts erected on the lands held by tenants are saleable as movable property, and the Small Cause Courts have jurisdiction to cause such sales. Where there is an express contract as to substantial structures erected by the tenant the parties are bound by it, but the general law in India does not impose any disability on the tenant to remove at or before the termination of the tenancy² the materials of buildings erected by him. The Transfer of Property Act lays down — The lessee may remove at any time during the continuance of the lease all things which he has attached to the earth provided he leaves the property in the state in which he received it.³ But doubts have been thrown as to the justness of the rule and its applicability.⁴

Fisheries.

The profits derivable from land covered with water are from fish and plants and fruits which grow in it. The right is incorporeal. No right of occupancy can be acquired by a tenant from long occupation of a fishery.⁵ If a tank used for the preservation and rearing of fish forms a part of an agricultural holding it goes with the rest of the land. But the incidents of tenancies in other tanks and fisheries are the same as those of immovable properties other than agricultural. It has however been held⁶ that long

¹ Parbatty v Woomatara 14 B. L. R. 201. See Mahalatchmi v. Palani, 6 Mad H. C. 245.

² *Ante* p. 35.

³ Act IV of 1882, Sec. 108, cl. (4). *Ante* pp. 35-36.

⁴ Woomakant v. Gopal 2 W. R. (A. C. X.) 19; Siboo v. Gopal, 19 W. R. 200; Nidhi v. Ram 20 W. R. 341; Sham v. Court of Wards, 23 W. R. 432; Juggubundhu v. Promotho, 1. L. R. 4 Cal 767.

⁵ Nidhee v. Nistardace 21 W. R. 386 & 13 B. L. R. 416.

occupation of a tank on payment of uniform rent, coupled with occasional transfers of the tenant-right not objected to by the landlord, may raise a presumption of the fixity of the tenure, notwithstanding that no right of occupancy can be acquired by the tenant by occupation for more than twelve years. The doctrine—*optimus interpres rerum usus*—has been applied in these cases as in other cases of lost or ambiguous grants

The word *julkar* is occasionally used in the sense of land covered with water, as long as there is water on it and it is capable of being used for rearing and catching fish ¹ A settlement of a *julkar*, however, does not necessarily involve a right to the soil. Evidence of facts and circumstances may, however, be given to show that the settlement of a *julkar* includes the right to the soil underneath the water, the word being used in a double sense ² Road-cess and Public-works-cess are not levied on *julkars* ³ The income derived from *julkars* in the *mofussil* are taxed under the Income-Tax Act. The rent of a fishery is recoverable under the procedure laid down in the Bengal Tenancy Act ⁴

Their incidents

The lease-hold right in a fishery may be determined in the same way as other leases of non-agricultural lands, and the right of a tenant necessarily ceases on the water drying up. Unless the lease covers also the land on which the water lay, the land, as soon as it ceases to be covered with water, comes into the possession of its owner, discharged of any right which the tenant might have to the fish and the plants and fruits that grew in water ⁵ There are

Determination of leases of fisheries

¹ *Radha v Neel*, 24 W R 200, *David v Grish*, I L R 9 Cal 183

² *Rakhal v Watson*, I L R 10 Cal 50

³ *David v Grish*, I L R 9 Cal 183

⁴ A& VIII of 1885, Sec 193, A& X of 1859 Sec 23, cl (4)

⁵ *Saroop v Jardine*, 2 Hay 468, *Bissen v Khyrunniss*, 1 W R 79, *Kalee v Dwarka*, 18 W R 460

on
Customary
rights.

numerous instances of land belonging to one person and the right to fish to another ¹

Pasturage, burning grounds burial grounds and places of public worship are, in the large majority of cases in this country public, in the sense that they belong to or are capable of being used by a community or classes of individuals in a village. Such rights are necessary for the preservation of society. In the Permanent Settlement of 1793 these public or *customary* rights were not sufficiently protected though their existence must be traced to a very early stage of civilization. *Customary* rights belong to no individual in particular, but may be enjoyed by any person who for the time being inhabits the locality to which these rights are appurtenant or who belongs to the particular class entitled to their benefit.² Any resident of the locality may assert the right in a Court of law. In order to give validity to these customary rights all that is required is that they should be reasonable and certain.³ The proprietor of an estate or the holder of a subordinate tenure under him may claim to have proprietary right with respect to the lands which are subject to such customary rights but the use is in the inhabitants of the locality or a particular section of it.

Pasture lands.

To an agricultural population, pasture-land is of the utmost importance and there is seldom a village in Bengal which has not a large piece of land attached to it for the grazing of cattle belonging to its inhabitants. *Manu* speaks of such pasture lands


Grey v Anund, W R. (1864) 108.

Goddard on Easements, (4th Ed.) p. 25.

Luchmiput v Sadatulla 12 C L R. 382; Broadbent v Wilkes Willes 360; Hilton v Earl of Granville, 5 Q B. 701 sc. 13 L. J (Q B) 193; Wakefield v Duke of Buccleuch L. R. 4 Eq. 613, sc. 36 L. J Ch. 763; Blackett v Bradley 1 B & S 949, sc. 31 L. J (Q B) 65; Carlyon v Lovering 1 H & N 784 sc. 26 L. J Exch. 251; Rogers v Taylor 1 H & N 706, sc. 26 L. J Exch. 203.

in chapter VIII, verse 237—"On all sides of a village or small town, let a space be left for pasture, in breadth either four hundred cubits, or three casts of a large stick, and thrice that space round a city or considerable town"¹ *Yajnavalkya* also says—"There shall be set aside in every village a piece of pasture-land, the quantity of the land to be set aside being determined by the villagers themselves (where the land to be set aside is of small area), or by the king (where a large tract of land is intended to be set aside) A Brahmin has the right to collect grass (for his cows), twigs (for *homa*) and flowers (for worship), wherever and whenever he finds them"² The custom as to the use by the community of such pasture-lands is also reasonable, and there is nothing uncertain in it Pasture-lands in the occupation of particular individuals or families, rent being paid for the same, have the same incidents as other agricultural lands³ Suits for the recovery of the rents of pasture lands are cognizable by the same tribunals as other ordinary rent suits for agricultural lands⁴

There is also nothing unreasonable or uncertain in the custom of the members of a community in a village using, as of right, portions of land in it, for burning or burying the dead The Hindu population urgently require burning places The Mahomedan population require burial grounds If these particular classes have used certain pieces of land

 Grounds for burning and burying dead bodies.

¹ धनुःशत परीक्षारी ग्रामस्य स्यात् समन्ततः ।

ग्राम्यापातास्त्रयीवापि त्रिगुणी नगरस्य तु ॥

Manu, Chap VIII, v 237.

² ग्रामेच्छया गोप्रचारी भूमी राजवशेन वा ।

विजसृष्टैध.पुष्पाणि सर्वतः सर्वदा हरिः ॥

Yajnavalkya-Smṛiti, Vyavaharadhyaya, Sloka 166

³ *Ante p* 404

⁴ Act X of 1859, Sec 23, cl 4, Act VIII of 1885, Sec 193

for a good number of years for the purposes of burning or burying the dead, they acquire rights to them which ought not to be easily defeated. On the abandonment of the use the landlord may take possession of such lands.

om
Right to take
wood from
jungles

The right to take wood from a forest adjoining a village is also claimed in some localities specially in the Noo regulation Provinces. But such a custom will hardly find support from Courts of justice at the present day. With the increase of population and demand of wood forest lands would be denuded and as held in the case of *Luchmiput Singh v Sadatulla Nusso*¹, such a custom would be deemed uncertain and unreasonable. If a forest is reserved the taking of wood without permission is punishable.²

¹ 12 C. L. R. 382
² Ante p 54.

LECTURE XIII.

ORISSA AND THE SCHEDULED DISTRICTS.

The peculiarities of the incidents of landed properties in the different localities of the Lower Provinces of Bengal, involving, as they do, peculiarities in their modes of devolution and disposition, cannot make the same set of rules of law, especially as to procedure, suitable to all of them. This is due partly to the varieties in physical features and partly to differences in the habits and customs of the peoples and in their stages of civilization. The law of landlord and tenant, suitable to the people inhabiting the rich deltaic plains, cannot be suitable to the aboriginal inhabitants of Santhalia or the Jungle Mahals, or to the leaf-wearers of the Hill Tracts of Orissa. What are good laws for the permanently settled area of the Lower Provinces are not necessarily so for the *khas mahals* or the temporarily settled districts. Strict adherence to the laws of procedure conduces to the good government of the major part of these vast provinces, while the rigidity of those rules would be a source of unmitigated evil in tracts inhabited by peoples who are yet in the lowest stages of civilization.

Necessity of
different laws
for different
districts

It has thus happened that Act X of 1859 with its amendments and Act VIII (B C) of 1869 are still retained in some parts of the country, notwithstanding their repeal by Act VIII of 1885 in the major part of the Bengal Provinces. Act X of 1859 and the amending Acts VI (B C) of 1862, VIII (B C) of 1865, and IV (B C) of 1867 and the portions of the Regulations of the Bengal

Rent Acts
in force in the
different dis-
tricts

Code repealed by the Bengal Tenancy Act¹ are still in operation in the division of Orissa and in Manbhoom and Jalpaiguri. Only certain parts of the Bengal Tenancy Act have been extended to Orissa. Bengal Act VIII of 1869 remains unrepealed in Sylhet which was once a part of the Regulation Provinces and is now included within the Chief Commissionership of Assam. The other Assam districts have their own special rules.² The Chotanagpur division, at one time known as the Jungle Mahals has excepting Manbhoom the Chotanagpur Landlord and Tenant Procedure Act³ while Santhalia has its own Regulations.⁴ The rest of the Scheduled Districts⁵ in Bengal are of very little importance.

Orissa division

The present Orissa division includes a large tract of country, but except on the level plains on the sea shore the people are either still in a very rude state or are just emerging from barbarism. At the date of the grant of the Diwani in 1765 and until the year 1803 Orissa included only the district of Midnapur and a part of Hughli—the tract of country between the Suvarnarekha and the Rupnarayana. Orissa proper was a part of the territory of the Bhonsla family who had their capital at Nagpur in Central India. By the treaty of Deogaon signed on the 17th December 1803 the province of Cuttack including the port and district of Balasore and all the territories west of the river Warda and south of the Suvarnarekha were ceded to the East India Company. The tract consisting of Balasore Cuttack and Puri and the hilly country known as the Tributary Mahals (Rajwara) held by the Chiefs called *khandaits* was Orissa proper and has since 1804 been named Orissa while Midnapur now included within

¹ Act VIII of 1885, Appendix, Schedule I

² Assam Land Revenue Regulation I of 1886

³ Act I (B.C.) of 1879.

Regulations III of 1872 and II of 1886.

⁵ Darjeeling the Hill Tracts of Chittagong and the Mahal of Angul (Act XIV of 1874.)

the Commissionership of Burdwan, became a part of Bengal proper

Under the Maharattas, the *khandaits* used to pay for their territories (*killas*) fixed quit-rent or tribute called *tanki*. Of these, the *killadars* in the inland and hilly tracts continued to pay fixed tribute to the East India Company as semi-independent chiefs, under the Commissioner of the Orissa division. The territory of Mayurbhunj is one of the *killas* which are now known as the tributary mahals. In *Hursee Mahapatro v Dinobundo Patro*,¹ these tributary mahals of Orissa were held to be within the limits of British India, but were excluded from the operation of all the laws in force in British India not specially extended to them. The question came before a Full Bench of the Calcutta High Court in *Empress v. Keshub Mohajan and others* and *Empress v. Udit Prasad*,² and the majority of the Judges held — "The Maharattas probably exacted only tribute from these estates, and the East India Company could under the cession gain no higher rights," and that no direct civil jurisdiction having ever been exercised in the territory of *Mayurbhunj* by the Executive Government of India, this territory was not within the limits of British India. Prinsep and Mitter J J, however, were of a different opinion. For all practical purposes, however, the tributary mahals, may, in the present course of lectures, be considered as not included within British India.³

Tributary
mahals

The *killas* nearer the level country became per-

Moghulbundi

¹ 1 L. R. 7 Cal 523, *sc*, 9 C L R 93

² 1 L. R. 8 Cal 985, *sc*, 11 C L R. 241

³ Regulation XII of 1805 mentions in sections XXXVI and XXXVII, Neelgery, Bankey, Joormoo, Nirsingapore, Augole, Toalcherry, Attghurb, Kunjur, Kindeapara, Neahgurb, Rampore, Hindole, Teegereah, Burrumboh, Deckenaul and Mohurbunge. The jungle mahals are not under the Regulation laws. Of these Bankey and Augole came subsequently within direct British rule and Bankey is now a part of the Regulation District of Pooree. These semi independent tributary mahals are also Pes-Kash mahals — *Hunter's Statistical Reporter, Orissa*

maoently settled estates and are governed by the same rules¹ as permaoently settled estates in other districts. Regulation XII of 1805 which incorporated the Proclamation relative to the settlement of land revenue in the *Moghul bundi*² territory of Cuttack and which³ was published on the 15th September 1804 by the Board of Commissioners legalized the previous settlement of the province. The rules laid down in this Regulation and Regulation VII of 1822 have been the bases of all the subsequent settlements.

Regulation
XII of 1805

Sections 4 to 7 of Regulation XII of 1805 dealt with the remainder of the province which was not permanently settled. A series of ten short temporary settlements followed, the last of which expired in 1837. In 1838 thirty years settlement was concluded under the provisions of Regulation VII of 1822, and that settlement expiring in 1867 was renewed without any alteration on account of the famine, which had impoverished the province in 1865 for a further period of thirty years and is, therefore, now in force⁴. The proceedings for the settlement that will take effect from the year 1897 are now in progress.

Rept Acts in
force in
Orissa.

By the Government notification of the 10th September 1891 chapter X and sections 3 to 5, 19 to 26 41 to 49 53 to 75 and 191 of the Beogal

List of estates of which the jumma was declared to be fixed in perpetuity Secs XXXIII XXXIV and XXXV of Reg XII of 1805, (1) Durpum (2) Sookindah (3) Muddoopore, (4) Jaigir of Malood (5) Anil (6) Cojang (7) Putra (8) Humlispore (9) Miritchpore (10) Bishenpore and (11) Kunka. The estate Khurda became a khas mahal in 1804, having been forfeited for rebellion. These estates are altogether fifty in number.

Orissa was conquered by the Moghuls about the year 1580 and from that time the long strip of cultivated land which lies between the western mountain tracts and the sea board marshes and from which the conquerors derived their revenue, became known as the *Moghul bundi*.

Act X of 1867

Tenancy Act have been extended to Orissa, and by the notification of the 27th June 1892, sections 27 to 38 and section 80 of the Act, have also been extended. In other respects, the provisions of Act X of 1859 and its amending Acts are in force in the province and regulate the relationship of landlord and tenant. The powers of Settlement-officers are regulated by the Bengal Tenancy Act, the Government dealing with the raiyats of the temporarily settled estates as a proprietor is entitled to do under the Bengal Tenancy Act. The holders of the estates are entitled to re-settlement under the provisions of Regulation VII of 1792.

Leaving out of our consideration the military fiefs or the tributary estates, which had evidently been granted like Mayurbhanj, Neelgiri and Keunyjhar for the protection of the level country from the inroads and ravages of the aboriginal tribes who dwelt further in the interior, the level country which is the more valuable portion of the Orissa division—Balasore, Cuttack, and Puri, may be called the Crown-Land, being directly under British administration. As in Bengal proper, the holders of land may be broadly classified into—(1) zemindars paying revenue direct to Government, (2) intermediate tenure-holders paying revenue through the zemindars, (3) holders of resumed revenue-free tenures, (4) tenure-holders paying quit-rent, and (5) the last and the most important—the raiyats.

Classification
of landed in-
terests in
Orissa

I do not propose to tire you with the various names, according to the various shades of difference, in origin and status, of the estates paying revenue direct to Government. These names are numerous and should find a place in a glossary. The differences in meaning are not always easy to catch. *Sreechandani* (mild as white sandalwood), *harichandan* (sweet as yellow sandal wood), *sudhakar* (receptacle of nectar), with the numerous other names given by the Gajapati

Zemindaries

kings and names derived from *kanungoes* and *chow dhuries* have attractions for the lower orders of people in these provinces, but to a student of law they must be very dry

Patna and
khariya es-
tates.

The *patna* and the *khariya* estates being held by *bhuiyas* or owners of the land deserve particular mention in as much as they are instances of the recognition by the older governments of the country of the proprietorship of the soil being vested in the actual occupiers. The word *bhuiya* itself implies property in the soil as distinguished from mere right to collect rent

Mukuddami
tenures.

The names of the intermediate tenures are almost as numerous as those of the estates but only two of these deserve particular mention—*mukuddami* and *sarbarakari* tenures. The *mukuddams* have no proprietary right in the lands composing their villages but they have the entire management and control of them including waste lands. The zemindar only receives a fixed percentage though the revenue is paid through him. The tenure is hereditary and the *mukuddam* can alienate it or any portion of it at will. Bahu Ranggalal Banerji, who was a Deputy Collector in these provinces and who is better known to many of you as a Bengali poet, remarks—‘They had formerly powers for the apprehension of offenders the settlement of village lands, and the management of village expenses. They were the heads of villages the zemindar receiving rent through their intervention.’ At the settlement of Orissa in 1804 they were considered to be intermediate tenure holders.

Sarbarakari
tenures.

The *sarbarakari* tenures have their origin in the village accountants. From being managers of revenue affairs remunerated by a percentage on the collections from the raiynts they are now recognised as subordinate tenure holders, either hereditary or non hereditary. It has been held that the *sarbarakari* tenure is a recognised under tenure in Cuttack that the *sarbarakar*

has almost the same sort of right as the *mukuddam*, that in a case of the existence of several joint *sarbarakars*, the Collector has the power to select one or more of the body to be the recorded manager of the *sarbarakari*, and that ordinarily the tenure is not heritable or divisible. Neither hereditary nor non hereditary *sarbarakars* had any power of alienation or right to partition without the consent of the zemindar, and both classes of tenures are liable to cancelment or resumption by the zemindar on their falling into arrear. *Sarbarakari* sanads are almost exactly the same in their terms and conditions as those creating the *mukuddami* tenures. Temporary *sarbarakars*, however, have now disappeared. Some of the *maurusi sarbarakars* are still recognised.

At the time of the settlement of this province, considerable portions of land were claimed as *lakhiraj*, but were resumed under the Resumption Regulations, and assessed with revenue. *Nankars* and *jaigirs* were very numerous, but they were almost all resumed and assessed at half rates. Most of them pay revenue through the zemindars. Only the holders of more than seventy-five bighas of *lakhiraj* resumed lands were raised to the rank of zemindars.

Quit-rent tenures consist of *ayma* and *tanki* estates. *Ayma* lands are those granted by the Moghul governors to learned or pious Musalmans, for religious or charitable uses in connection with Mahomedanism, subject, as in Bengal proper, to the payment of small quit-rent. The British Government has recognised these *ayma* grants as hereditary and transferable. *Tanki* land is held at quit-rent, being one of the perquisites attached to the office of *sudder kanungo* during the Moghul period. There are various other kinds of similar quit-rent-tenures which do not deserve particular mention.

The raiyats of the Cuttack provinces were divided into two classes – the *thani* or resident, and the *pahi* or non

resident The fixed cultivator has lived in the village and cultivated its lands from time immemorial His homestead land is rent free, and he pays at customary rates rent for the rest of his holding Occasionally he has to pay for his homestead land but the rate of rent is very low He has a right of occupancy but it is not transferable. The rent though levied according to well established rates is however higher than that paid by *pahis* or migratory husbandmen He has a home of his own where his ancestors dwelt for ages he sits under the shade of the trees which they planted he has a local habitation and a name and a degree of credit which *pahi* cultivators do not possess But this strong love of home enabled the superior holders to exact higher rents from the *thani* or resident cultivators besides *abwabs* and extra collections During the settlement of 1835, many of these *thani* raiyats obtained palm leave leases (*talpottahs*) at lower rates and these *talpottahs* gave them a position of importance which the pressure of increasing population has since enhanced

Pahi raiyats.

The *pahi* raiyat who was free to pick and choose and to abandon the land whenever he liked, having neither the privileges nor the hurdens of the *thani* raiyat used to hold his *srahle* lands at a sensibly lower rate of rent He had no position in the village He was not subjected to the payment of *abwabs* as the superior holders were afraid that such impositions would lead them to go over to other villages

Chadnia raiyats.

There is a third class of raiyats who live in the villages but do not cultivate rice lands like the *thani* raiyats, nor have they any other lands besides the homesteads on which rent could be assessed The industrial population, artisans and tradesmen belonging to the lower castes have only homestead lands for which they pay rent They are known as *chadnia* raiyats but their number is not considerable Act X of 1859 had nothing to do with *chadnia* raiyats, but the Act gave

the *pahi* or husbandmen, who were mere tenants at will, the status of occupancy-raiyats

The zemindars of the Chotanagpur division go by the names of *rajas*, *tekaets*, *thakurs* &c, and their law of succession, as in some other ancient zemindar families in the Regulation districts, is the law of principalities—primogeniture. The Government recognized in Regulation X of 1800 their impartibility and the exceptional rule of succession to the eldest son only. The other sons of the last proprietor are entitled to maintenance only, for which grants of land are generally made by the eldest son after the succession to him opens out¹. These grants are known as *khorphosh* or *babuana*. Thus, the laws relating to partition of estates and separation of shares have practically no application in this division. It has also been held that the *kulachar* or rule of succession is generally lineal, females being excluded, and until an elder line is exhausted, none in the next line is entitled to succeed, notwithstanding proximity of sapinda-relationship and superiority in age². Such a rule of succession is not in conformity with either the old patriarchal system which made the eldest male member of a family its chief or head, or the text of *Manu*—"To the nearest sapinda the inheritance belongs,"³ which is the basis of Hindu law in all the schools. The question has not, however, been finally decided by the Privy Council, and the custom must be proved in the case of each family by cogent evidence.

Chotanagpur-
Primogeni-
ture

¹ *Maharani v Bence*, 4 S D A 79, *Bihu v Maharaja*, 6 S D A 140, 6 S D A 282, *Anund v Gurrood*, 5 M I A 82, *Thakoor Jeetnath v Lokenath*, 19 W R 239, *Woodoyaditto v Mukoond*, 22 W R 225, *Uddoy Adittya v Jadub*, I L R 5 Cal 113 and I L R 8 Cal 199

² *Periag v Madhu*, A O D Nos 84 and 97 of 1887, decided 25th June 1889

³ अनन्तरःसपिण्दाद्यस्तस्य तस्य धनं भवेत् ।

अत ऊर्ध्वं सकुल्यः स्यादाचार्यः शिष्य एव वा ॥

Encumbered
Estates Act.

Notwithstanding the impartibility of these estates, most of them are highly encumbered, and were it not for the very beneficial intervention of the Government under the Chota Nagpur Encumbered Estates Act—VI (B C) of 1876, many of them would by this time have been swallowed up by money lenders. The application of the Act to any estate deprives the proprietor of his power of management and of disposing of his estate and the Civil Courts also lose their power to pass decrees for debts and realise them by execution. The Act has been extended to the Deo Estate in the District of Gya (IX of 1886)

Under
tenures

The impartibility of these estates is no bar to an alienation by a holder if such alienation be other wise valid. The holders may also create subordinate tenures such as *putnis* and *mukurraris* and the next taker has no right to question their validity on the ground of impartibility. In *Anund Lal Sing Deo v Dheeraj Gurrood Narayan Deo*¹ the Privy Council left the question open but in *Uddoy Aditya Deb v Jadub Lal Deb*² the validity of alienations either by way of sales or leases has been expressly recognized. As a necessary corollary, limitation which bars a holder of an estate will also bar the next taker

Maintenance
grants.

There is an important class of tenures in the Chota Nagpur division—the maintenance (*khorphosh*) tenures. Grants of land made for the maintenance of the junior members of a zemindar family governed by the law of primogeniture are generally rent free but occasionally quit rents are payable. Their incidents are various, depending upon the custom and usage of each family and the terms of the written grants. But it seems that no grant is valid, if the grantor encroaches on the power of the next taker by making one not authorized by

¹ 5 M. L. A. 82.

² 1 L. R. 5. Cal. 113; affirmed by the Privy Council 1 L. R. 8 Cal. 192.

family custom or usage. A grant may be a simple assignment of rent revokable at the will of the grantor. In other cases, it may be valid during the life-time of the grantor, being resumable by the next-taker of the parent estate. A grant in perpetuity for the maintenance of the grantee and his heirs has been held in the Pachete Estate to be invalid¹. Again a grant for maintenance may enure to the benefit of the grantee only,² being resumable on his death. In some families, grants have been held to be good as regards the grantees and their heirs male, and the *khorphosh* tenures do not revert to and merge in the parent estates as long as there are male heirs of the grantees.

In the districts comprising Chotanagpur division,³ with the exception of Manbhoom and the Tributary Mahals, the Rent-Law in force is Bengal Act I of 1879—the Chotanagpur Landlord and Tenant Procedure Act. This is a Procedure Act, the modifications in the portion dealing with substantive law being very slight. The law as to landlord and tenant as laid down in Act X of 1859 has been practically retained, except as to certain peculiar kinds of tenure-holders. Section 19 of the Act deals with *bhumhari* and *khudkati* tenures, and lays down that no tenant of such lands shall be liable to the enhancement of rent previously paid by him for such lands, unless it be shewn that the tenure has been created within twenty years before the institution of the suit to enhance the rent of such lands. The section further provides that where the enhancement of rent of such tenures is decreed, the rent assessed shall not exceed one-half of the rent paid by an ordinary raiyat with a right of occupancy on the same class of land with similar advantages.

Act I (B C)
of 1879

¹ Anund v Dheeraj Gurrood, 5 M 1 A 82

² Rajah Woodoy ditto v Mukoond, 22 W R 225

³ Lohardagga, Palamau, Hazaribag, Singhbhum

⁰
Bhuinhars.

The *bhuinhars* are an important class of tenure-holders in these districts, and they are supposed to be the descendants of those who originally settled and were the first tillers of the soil in the villages. The *mundas* of Chotanagpur claim to be the original settlers, but as a matter of fact we scarcely find any *munda* or *bhuinhar* in this district. The truth seems to be that the *bhuinhars* are the descendants of men who were in the villages when Hindu authority was first asserted. The Hindu landlords put down the influence of the *mundas*, if they had any at that time, and extorted services from the settled inhabitants. These services were originally feudal, such as attendance at marriages following the chiefs in war &c. but gradually half rent was imposed. For causes well known in the history of civilization, the *bhuinhars* became gradually reduced in number. The Hindu Rajas of the Nag family, who claimed to be the descendants of the Solar kshetrias and their friends and relations gradually absorbed the *bhuinhars* lands. Shortly before 1869, Christian missionaries specially the Lutherans, were making converts of the Non Hindu tribes. The Christian *bhuinhars* learned of secular things more than the sacerdotal and waking from a long sleep of apathy and submission they took forcible possession of large quantities of land to which they had not the remotest title. Riots followed and the Chotanagpur Tenures Act II (B.C.) of 1869 was passed for the settlement of the district. Sir William Hunter in his Statistical Accounts of the Lohardagga district thus sums up the characteristic provisions of the Chotanagpur Tenures Act —“Bhuinhari, as defined in the Act, includes the four cognate privileged tenures known as *bhutkheta*, *dalikatari*, *pahni* and *mahtoas* while *manjhas* or *manjhis* includes *bhutkheta*. The jurisdiction of the regular courts is barred and Special Commissioners are appointed to demarcate and register the tenures

Act II (B.C.)
of 1869.

which come under the Act, subject to appeal to the Commissioner of the Division Pleaders (*vakils*) and law agents (*mukhtars*) are not allowed to be heard without special permission The term of limitation is fixed at twenty years, and the service conditions of the *bhuinhari* tenures are allowed to be commuted for a money payment At the same time, no date is fixed within which such claims to hold land on a privileged tenure must be put in In consequence of this omission, and the impossibility of commencing the work of demarcation in all parts of the District at once, it is feared, that when some of the more remote pergunahs are visited by the Special Commissioners, serious difficulties may arise" The Bhuinhari Act, instead of improving the condition of the *bhuinhari* population, had the effect of eliminating them Section 19 of the Act of 1879 placed the *bhuinhars* in a securer position on favourable terms Section 20 of the Act of 1879 provides that no tenant of lands known as *korkor*, *baibala*, *khandwat*, *sajhwat*, *jalsasan* and *ariat*, shall be liable to any enhancement of rent except under the terms of written contracts, or in accordance with the general custom prevailing with respect to such lands in the village in which they are situated

There is an important class of tenures in the Chotanagpur Division—*jaigirs* and *chakerans* The holders render services of various kinds to the *rajas* and the village communities and pay either no rent or nominal rent Considering the altered state of things under the British Government, commutation of service into rent is very necessary.

Service tenures

The Tributary estates¹ in this division have their chiefs as the Tributary mahals in Orissa, and the laws in force in British India have no application to them

Tributary mahals

Manbhoom, one of the districts included within the Chotanagpur division, and Jalpaiguri are within the per-

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Service ten-
ures

Tributary
mahals

Manbhoom
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guri

¹ Bonai, Jaspur, Udoypur, Kharsoa, Charbabar, Korca, Ganghen

manently settled area of the Bengal Provinces and are to a considerable extent inhabited and cultivated by people who have migrated from the adjoining settled districts. There are however masses of non-aryan population who have not yet fully adopted the habits, customs and languages of their aryan neighbours. There are Mundas, Uraos, Coles and Santhals in Manbhoom and Koches and other non-aryan tribes in Jalpaiguri. The Privy Council has declared them to be non-aryan and non-Hindu.¹ Act X of 1859 is in force in these districts.

Jalsasan
tenures.

The raiyati tenures peculiar to Manbhoom are the *jalsasan* and the *noabad*. The physical features of this part of the country have enhanced the value and utility of tanks (*bandhs*). Large pieces of land are granted for the excavation of tanks on the condition that water should be allowed to be used for purposes of drinking and irrigation of the neighbouring lands of other raiyats and the grantees should have the right of holding the lands by the sides of tanks either at small quit rents or variable rents portions of the lands being held rent free and permanent remissions being allowed as remuneration for labour and expenditure incurred by the tenants.

Noabad
tenures.

Noabad grants are made for the clearance of jungles and for cultivation generally six annas share of the lands being allowed to be held rent free the remainder being assessable at progressive rates and liable to enhancement under the provisions of Act X of 1859. These are *jungleburi* holdings.

Tenures in
Jalpaiguri

The Raja or Raikut of Baikunthpur and the Maharaja of the Kuch Behar State own large parts of Jalpaiguri as zemindars. The Government itself is the zemindar in the Western Doars. The tenure holders directly under the zemindars are known as *jot dars*. These *jotes* are generally permanent and are transferable by custom.

The first *jot-dars* were apparently occupiers of the soil, cultivators and peasant proprietors, as the word *jote* implies. But in course of time, subletting became common. Usufructuary mortgages of the *jotes* are frequent. On failure of heirs and on abandonment, the *jotes* revert to the parent estates.

Chukanidars or *mulanidars* are an important class of subordinate-holders in Jalpaiguri. They are temporary lessees or under raiyats under the zemindars or jot-dars. They hold for terms of years, and their rights are not transferable by custom. The *dar-chukanidars* or *darmulanidars* are sub-lessees with still inferior rights. The *raiya*ts (prajas) hold from year to year only.

Raiya^ti hold-
ings.

The trial of Rent cases under Act X of 1859 is in the hands of the executive officers of the Crown, the Collectors, and Deputy Collectors, with the right of appeal to the District Judges and Collectors, and in some cases second appeal to the High Court. In suits of the value of over Rs. 5000, an appeal lies directly to the High Court. In some instances, the Collectors and Commissioners of Revenue have powers of revision. In the Regulation Districts of Bengal proper and Behar, this was found inconvenient, and within ten years of the passing of Act X of 1859, the jurisdiction in rent suits was taken away from the executive officers and was given to the regular civil courts. But the conflict of jurisdiction, which was pre-eminently a source of litigation, still exists in these districts. The people, however, are simple and litigations are few.

Jurisdiction
of Collectors
and Commis-
sioner

In suits for the enhancement of rent of raiyats, the main peculiarity, as you have seen, is the necessity of the previous service of notice¹. No suit for enhancement of rent can succeed under Act X of 1859, unless a notice

Enhancement
of rent

¹ *Ante* p. 373.

in proper form has been previously served on the raiyat through the proper channel

Measure-
ment.

The sections of Act II (B C) of 1862 about measurement through the Collectors were replaced in Act VIII (B C) of 1869 by sections 37 and 38. They are with slight modification incorporated in sections 90, 91 and 92 of the Bengal Tenancy Act. Act II (B C) of 1862 with its imperfect provisions as to record-of rights has been retained in these provinces. I have already dealt with these and the other provisions of the Act of 1859 and 1869 and the Acts modifying them.

Santhal Per-
ganahs.

It seems that the provisions of Act X of 1859 were originally applied in the Santhal Perganahs in questions between landlord and tenant. Regulation III of 1872 (Santhal Perganahs Settlement Regulation) and Regulation II of 1886 (Santhal Perganahs Rent Regulation) made Act X of 1859 inapplicable. The *manjhis* or village headmen were selected as farmers of the villages, specially in the *Damanikoh*, and thus *mostajir* and *manjhi* have become convertible terms. Regulation III of 1872 laid down rules as to record of rights and the adjustment of rents by Settlement officers. The District officers are vested with the power of deciding disputes as to record of rights. An appeal lies in some instances to the Deputy Commissioner and in others to the Commissioner of the Bhaguipore division. The proceedings are generally simple in their character, litigations being confined to the permanently settled estates outside the *Damanikoh*. The right-of-occupancy of the raiyats is much of the same nature as in the Regulation districts, the power of re-settling rents by the Settlement officers being wider—agricultural skill and habits of life of tenants being taken into consideration. A raiyat may acquire an occupancy right not only by occupation for more than 12 years, but he may have an *equitable claim to occupancy* under section 18 of Regu

lation III of 1872 Exchanges of land between raiyats do not affect the acquisition of the right A raiyat, whether possessing a right-of-occupancy or not, cannot be ejected from his holding otherwise than in execution of an order of the Deputy Commissioner ¹

¹ Reg II of 1886, Sec. 25

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